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Explaining the Emergence of Transnational Counter-Terrorism Legislation in International Law-Making

Tilmann Altwicker*

ABSTRACT: As the recent adoption of UN Security Council Resolution 2178 on Foreign Terrorist Fighters shows once again, international law-making in the field of counter-terrorism has embraced a new mode. The article suggests that an approach drawing on new institutional economics is a commendable way to analyse the features of the new mode of international counter-terrorism law-making. Based on the reasons why states cooperate through law-making on matters of counter-terrorism, a taxonomy of international law-making techniques in this field is developed ('harmonisation', 'imposition', and 'diffusion' of legal norms).

The article argues that the new mode of counter-terrorism law-making can best be explained as emerging transnational legislation. 'Transnational legislation' refers to abstract-general norms on the conduct of non-state actors with cross-border application or intended cross-border effect. The key features of these norms are, ie, their regulatory nature, their regulatory depth, as well as their potential to be 'self-executing'. The emergence of this new body of law poses two key problems: How to facilitate further integration of the international and the domestic legal orders, and how to safeguard the integrity of the new transnational norms.

KEYWORDS: counter-terrorism, international law-making, transnational law/legislation, new institutional economics

1. Introduction

Counter-terrorism has become a highly innovative, experimental field of international law-making. While there is still no universal definition of

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terrorism in international law, other disciplines such as international relations and philosophy have come up with viable working definitions. Here, I follow Todd Sandler who defines terrorism as 'the premeditated use or threat of use of violence by individuals or subnational groups to obtain a political or social objective through intimidation of a large audience beyond that of the immediate victims'.¹ For more than a decade now (though with origins dating back long before the attacks of 9/11), the international legal agenda has been preoccupied with counter-terrorism.² The universal legislative framework against terrorism currently consists of 14 multilateral conventions,³ three law-making Security Council resolutions, as well as a number of influential soft law instruments. Regarding treaty law, I limit my analysis to the following five conventions deposited with the UN Secretary-General: Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;⁴ International Convention against the Taking of Hostages;⁵ International Convention for the Suppression of Terrorist Bombings;⁶ International Convention for the Suppression of the Financing of Terrorism;⁷ and International Convention for the Suppression of Acts of Nuclear Terrorism.⁸ These treaties were chosen for a number of reasons: First, the selected treaties reflect the development of more than 40 years of international law-making on counter-terrorism. Second, these treaties are referenced by other international legal instruments when the (highly controversial issue of a) definition of terrorism is at stake.⁹ Third, the selected instruments show the variety of regulatory choices available in international law-making on counter-terrorism (eg obligations to criminalise, obligations to cooperate, obligations to safeguard human rights while countering terrorism). Concerning UN Security Council resolutions, I draw

1. Todd Sandler, 'Collective versus Unilateral Responses to Terrorism' (2005) 124 *Public Choice* 75–93, 75.
2. For an overview, see Nigel D White, 'The United Nations and Counter-Terrorism' in Ana María Salinas de Frias et al (eds), *Counter-Terrorism: International Law and Practice* (Oxford, Oxford University Press, 2012) 54–82.
3. The universal legislative framework against terrorism currently consists of 19 international instruments, <www.un.org/en/counterterrorism/legal-instruments.shtml> (last visited 9 July 2017).
4. 14 December 1973, 1035 UNTS 167.
5. 18 December 1979, 1316 UNTS 205.
6. 12 January 1998, 2149 UNTS 256.
7. 10 January 2000, 2178 UNTS 197.
8. 14 September 2005, 2445 UNTS 89.
9. See art 1(1) of the Council of Europe's Convention on the Prevention of Terrorism, 16 May 2005, ETS No 196 (referring to the Appendix, which in turn relies on a list of 11 international counter-terrorism instruments among which those cited above are contained).

on Security Council Resolution (SC Res) 1373,¹⁰ SC Res 1540¹¹ and SC Res 2178¹² because these resolutions form a distinct regulatory framework on counter-terrorism. Finally, as a prominent example of how soft law functions in the field of counter-terrorism, I will examine the Financial Action Task Force (FATF) Special Recommendations on Terrorist Financing as this body of rules significantly determines—in line with the idea of transnational law—also the conduct of non-state actors (such as banks and other financial intermediaries).¹³

A closer look at the creation of this universal legislative framework reveals that international law-making is in a process of change. Though it seems too early to say whether the innovations made in the field of counter-terrorism are here to stay or even to spill over to other fields of international law (disregarding for the moment whether that would be desirable at all),¹⁴ a systematic approach to international law-making on global counter-terrorism is lacking. Is international law-making, within the field of counter-terrorism, entering a new stage? What are the suitable conceptual and methodological tools with which to analyse these developments? What are the reasons for this new mode of making global counter-terrorism law? While a comprehensive approach would have to include both the domestic dimension of global counter-terrorism law-making as well as judicial responses to it, the present article is limited to international law-making on this issue. The article argues that law-making in this field can best be explained as the creation of a 'transnational legislation' on counter-terrorism. I define the underlying concept of 'transnational law' as 'law on the conduct of non-state actors with cross-border application or intended cross-border effect'.¹⁵

The article includes five parts. Aiming at a principled explanation of the new mode of international law-making in the field of counter-terrorism, the second part outlines three reasons why states cooperate (through international law-making) on issues of global counter-terrorism in the first place. This part

10. UN Doc S/RES/1373, 28 September 2001.
11. UN Doc S/RES/1540, 28 April 2004.
12. UN Doc S/RES/2178, 24 September 2014.
13. <www.fatf-gafi.org/topics/fatfrecommendations/documents/ixspecialrecommendations.html> (visited 6 July 2017). Other influential soft law instruments are the Global Counter-Terrorism Strategy, GA Res 60/288, UN Doc A/RES/60/288, 20 September 2006, and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, GA Res 65/221, UN Doc 65/221, 5 April 2011.
14. For a critical stance, see Kim Lane Scheppele, 'From a War on Terrorism to Global Security Law', Institute for Advanced Study, <www.ias.edu/ideas/2013/scheppele-terrorism> (last visited 10 July 2017).
15. See in detail section 3 below (also for my understanding of 'legislation').

is based on new institutional economics and explains why actors engage in international law-making on counter-terrorism. The third part argues that the new international law-making in the field of counter-terrorism can best be explained as emerging transnational counter-terrorism legislation. The fourth part distinguishes three techniques used to create abstract-general norms on counter-terrorism. The fifth part concludes that the emerging transnational legislation on counter-terrorism poses two key problems, namely, first that of 'integration' (ie how to best bridge the gap between 'the international' and 'the domestic' in counter-terrorism law-making) and, second, that of 'integrity' (ie how to guarantee that the new transnational counter-terrorism norms are effectively constrained by human rights concerns).

2. Reasons for Transnational Counter-Terrorism Legislation

Why does the international community engage in counter-terrorism law-making? In order to be able to answer this question one must have an idea of what international law is fundamentally about and what interests it serves (and how). To phrase it as a question: What assumption concerning the purpose of international law do we make when we say that (more) international law is desirable or even necessary in the fight against global terrorism?

For the aims of this article, I assume that international law is in essence about *cooperation* among the actors of international law. For analytical support, I rely on a recent work by Joel Trachtman, *The Future of International Law*.¹⁶ The article follows Trachtman (who, in turn, relies on Wolfgang Friedmann) regarding his starting point that international law is about (a formal type of) cooperation.¹⁷ Why do states cooperate on matters of global terrorism? Surely, the reasons for international cooperation are a traditional 'battleground' of the sociology of international law.¹⁸ Trachtman approaches international cooperation from a public welfarist angle, claiming that the subjects of the international community (states, in his case) use international law 'to better their lot'.¹⁹ Thus, according to Trachtman, international cooperation takes place when it increases public welfare gains

16. Joel P Trachtman, *The Future of International Law: Global Government* (Cambridge, Cambridge University Press, 2013).

17. *Ibid.*, 22–40.

18. See Jan Klabbers, *An Introduction to International Institutional Law*, 2nd edn (New York, Cambridge University Press, 2009) 25–31.

19. Trachtman (n 16) 22–23.

for the participating members of the international community.²⁰ According to Trachtman, the content of public welfare is determined by domestic procedures (in democratic states through voting and elections).²¹ Applying Trachtman's approach to the problem at hand, the initial question can be reformulated as follows: What are the welfare gains expected from international cooperation on global counter-terrorism?

Methodologically, this part utilises a 'new institutional economics' approach (as Trachtman does, too).²² This approach can be gainfully applied when analysing the welfare gains expected from international cooperation in the field of global counter-terrorism. 'New institutional economics', in my view, provides the best explanation in matters of complex governance structures. It explains the formation and change of institutions, and addresses the underlying behavioural assumptions concerning human cooperation. For the present context of the reasons for cooperation on counter-terrorism, the following analytical concepts of new institutional economics are particularly useful: The production of public goods, transaction cost economics, and cost/benefit-analysis of institutions.

2.1. Efficiency Gains

The first straightforward reason for international cooperation on counter-terrorism is the (expected) efficiency gains. Global terrorism, by definition, crosses borders, as it targets victims of foreign states, and often affects the interests of more than one state. In this situation, efficiency gains through international cooperation are relatively easily made: For example, by sharing information on terrorist suspects, costly (and sometimes even impossible) intelligence collection by each state on its own can be avoided.²³ In many cases, foreign intelligence services will lack even the capabilities to collect

20. Trachtman (n 16) 23.

21. Trachtman (n 16) 23.

22. Trachtman (n 16) 13. The classical text of new institutional economics is Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge, Cambridge University Press, 1990). For an introduction, see Paul L Joskow, 'Introduction to New Institutional Economics' in Éric Brousseau, Jean-Michel Glachant (eds), *New Institutional Economics: A Guidebook* (Cambridge, Cambridge University Press, 2008) 1–20.

23. For transatlantic intelligence information-sharing between the US and the EU, see Christian Kaunert, 'The External Dimension of EU Counter-Terrorism Relations: Competences, Interests, and Institutions' (2010) 22 *Terrorism & Political Violence* 41–61, 55.

information on transnational terrorism on their own and therefore instead rely on international intelligence networks.²⁴ Furthermore, international cooperation allows for joint counter-terrorism investigations and actions: Surveillance missions on the High Seas where joint counter-terrorism action may reduce the costs for each participating state while at the same time ensuring the global movement of people and goods are a suitable example.²⁵ Furthermore, some have argued that cooperation tends to increase the ambitions of the participants, ie joint efforts would lead to an increased efficiency in the performance of a task.²⁶ In sum, international cooperation allows expecting the generation of better results in the prevention (and prosecution) of terrorist crimes.

Of course, not all members of the international community (states, for that matter) are affected by global terrorism to the same degree. Those states more affected by global terrorism are likely to anticipate greater efficiency gains from increased international cooperation than less affected states. Furthermore, asymmetries in the size or power of the actors (ie the capability to counter threats of global terrorism) are likely to affect each state's willingness to cooperate.²⁷ For example, while Switzerland has good reasons to consider itself a 'safe place' as regards global terrorism, it nevertheless actively participates in the major European and international security networks, eg Schengen.²⁸ A central reason is the limited capacity of Switzerland to independently ensure its own security. This is especially true regarding the protection of Switzerland's airspace which currently partly relies on foreign contributions, eg by France and Italy.

2.2. External Effects

Efficiency gains are not the only reason why states cooperate on matters of counter-terrorism. The way states deal with problems of global terrorism is likely to produce (negative) external effects, ie adverse effects caused by one

24. See Jennifer E Sims, 'Foreign Intelligence Liaison: Devils, Deals, and Details' (2006) 19 *International Journal of Intelligence and Counterintelligence* 195–217.

25. See on this Yonah Alexander and Tyler B Richardson, *Terror on the High Seas: From Piracy to Strategic Challenge* (Santa Barbara, Praeger, 2009).

26. Wynn Rees, *Transatlantic Counter-Terrorism Cooperation: The New Imperative*, 1st edn (Oxon, Routledge, 2006) 30.

27. On this point see generally Daniel W Drezner, 'Globalization and Policy Convergence' (2001) 3 *International Studies Review* 53–78, 60.

28. On the terrorism situation in Switzerland, see the 2014 Situation Report, Swiss Federal Intelligence Service (FIS), <www.vbs.admin.ch/en/documents/search.detail.document.html/vbs-internet/en/documents/intelligence-service/situation-reports/NDB-Lagebericht-14-e.pdf.html> (last visited 12 July 2017).

state affecting another state.²⁹ In the context of counter-terrorism, some speak of 'security externalities'.³⁰ The following hypothetical case may serve as an example: State A has a common border with state B. Due to a lack in professionalism and in capacity, state B does not provide for effective transport security and border control which causes increased spending in state A in order to prevent terrorists from infiltrating the country from across the border.³¹ The inaction (or incapacity) of state B, thus, has external effects in state A. In times of global interdependence the potential impact of negative externalities is ever more powerful and widespread.³² Cooperation is a way to address or 'internalise' some negative externalities. To get back to the example of states A and B: State A would enter into bilateral cooperation with state B or seek assistance from other states or the international community.³³

In the situation of external effects, collective action problems arise, such as deterrence races between states (by each state overspending on counter-terrorism and thus deflecting terrorist attacks to third countries) and free-riding problems (where one state anticipates another state to act that is either more powerful or more likely to be affected by an otherwise shared terrorist threat).³⁴ Cooperation in the form of international law is an attempt to address these collective action problems. Rules on jurisdiction that are contained in all international counter-terrorism conventions are a good example: By allocating jurisdiction, these international rules 'establish congruence between decision-making authority and the effects of the exercise of authority'.³⁵ Requiring contracting states to establish jurisdiction over certain terrorist offences (as suppression conventions do), thus eliminates a free-riding problem—contracting states are required to act upon allegations of terrorist offences regardless of whether they anticipate another state to act as well.

29. On external effects and international law, see Jeffrey L Dunoff and Joel P Trachtman, 'Economic Analysis of International Law' (1999) 24 *Yale Journal of International Law* 1–59, 14–16.

30. Howard C Kunreuther and Erwann O Michel-Kerjan, 'The Economics of Security Externalities: Assessing, Managing and Benefiting from Global Interdependent Risks, Risk Management and Decision Processes Center at the Wharton School of the University of Pennsylvania', <www.opim.wharton.upenn.edu/risk/papers/> (visited 6 July 2017).

31. This is the case, eg, with the Tajik-Afghan border. See the 2012 Country Reports on Terrorism, United States Department of State Publication, Bureau of Counterterrorism.

32. See Kunreuther and Michel-Kerjan (n 30) 3.

33. The latter happened in the case of Tajikistan, see 2012 Country Reports on Terrorism, *ibid*, 171–72.

34. Todd Sandler, 'Collective Action and Transnational Terrorism' (2003) 26 *World Economics Journal* 779–802, 781.

35. Trachtman (n 16) 26.

2.3. Weakest Link Public Good

In international legal literature, the global public goods taxonomy has recently gained some currency.³⁶ It can be useful for understanding global law-making efforts on counter-terrorism as well. The production of global public goods (and the problems surrounding that) is another reason why actors engage in international cooperation. 'Public goods' are defined by two characteristics: 'non-rivalry' (ie the good may be consumed by one actor without diminishing its availability to others) and 'non-excludability' (ie no actor may be excluded from consumption regardless of whether she contributed to its production or not).³⁷ The following goods are, among others, discussed under the heading of 'global public goods': environment, health, cultural heritage, knowledge and information, peace and security.³⁸

Public goods are usually distinguished on the basis of differences in their provision: 'aggregate effort public goods', 'single best effort public goods' and 'weakest link public goods'.³⁹ Aggregate effort public goods are those that can only be produced together (by all states). Daniel Bodansky gives the example of climate change mitigation. Climate change mitigation is 'a function of the total level of greenhouse gas emissions reductions achieved by all of the countries in the world'.⁴⁰ Single best effort public goods are unrelated to cooperative efforts, but instead 'depend on the single best effort of an individual actor or small group of actors', such as scientific discoveries.⁴¹ Most relevant in the context of counter-terrorism is the third category of weakest link public goods. The provision of such goods does not depend on aggregate effort, but on the performance of the 'weakest' member of a community.⁴² An example is the prevention of global pandemics: The success of the eradication of smallpox could be 'undone by a single actor that fails to do its part'.⁴³ Some efforts by states in the global fight against terrorism can be considered a weakest link

36. See Inge Kaul, 'Global Public Goods: Explaining their Underprovision' (2012) 15 *Journal of International Economic Law* 729–50; Daniel Bodansky, 'What's in a Concept? Global Public Goods, International Law, and Legitimacy' (2012) 23 *European Journal of International Law* 651–68; Gregory C Shaffer, 'International Law and Global Public Goods in a Legal Pluralist World' (2012) 23 *European Journal of International Law* 669–93.

37. Bodansky, *ibid.*, 652.

38. This list is based on the case studies in Inge Kaul, Isabelle Grunberg and Marc A Stern (eds), *Global Public Goods: International Cooperation in the 21st Century* (Oxford, Oxford University Press, 1999).

39. See on this Bodansky (n 36) 658–65.

40. Bodansky (n 36) 658–59.

41. Bodansky (n 36) 663.

42. Bodansky (n 36) 660.

43. Bodansky (n 36) 661.

global public good. For example, Nico Krisch has recently discussed countering terrorist financing as a weakest link good.⁴⁴ Non-compliance of just a few states with the global rules will seriously hamper efforts (which are oftentimes futile) by individual states to curb terrorist financing.⁴⁵ The same is true for nuclear terrorism,⁴⁶ and for states failing to prevent terrorists from building training camps on their territory.⁴⁷ All (or much) effort by the international community to contain global terrorism is useless if just one state defects.

3. Elements of Transnational Counter-Terrorism Legislation

Is there such a thing as 'transnational counter-terrorism legislation'? By a doctrinal analysis of global counter-terrorism norms contained in international treaties, Security Council resolutions and soft law instruments, this part argues that transnational counter-terrorism legislation is indeed emerging.

There are two preliminary remarks. First, there is not one definition of 'transnational law', there are many. However, probably due to the diversity of 'transnational issues', most of these definitional attempts do not offer a promising conceptual framework within which one can reconstruct the global law on counter-terrorism.⁴⁸ Throughout this article, I refer to 'transnational law' as law on the conduct of non-state actors with cross-border application or intended cross-border effect.⁴⁹ Transnational law in my reading, therefore, has two conceptual elements: One element pertains to the cross-border application or

44. Nico Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108 *American Journal of International Law* 1–40, 20–25.

45. This is one of the reasons the international community seeks to eliminate 'safe havens' for terrorists, see SC Res 1373, UN Doc S/RES/1373, 28 September 2001, para 2(c).

46. For an economics approach to nuclear terrorism as a weakest link problem, see Stefano Barbieri and David A Malueg, 'Securing Security when Terrorists Attack the "Weakest Link"', <ssrn.com/abstract=1981319> (visited 6 July 2017).

47. I am grateful to Guy Harpaz for this point.

48. Definitions of transnational law are often too broad. See eg Philip C Jessup, *Transnational Law* (New Haven, Yale University Press, 1956) 2 ('all law which regulates actions or events that transcend national frontiers ... [relating to] [b]oth public and private international law ... [as well as] other rules which do not wholly fit into such standard categories').

49. This definition is inspired by the one given by Daniel Bethlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law' (2014) 25 *European Journal of International Law* 9–24, 23 ('the law that applies internationally to the conduct of individuals') and by Roger Cotterrell, 'Transnational Communities and the Concept of Law' (2008) 21 *Ratio Juris* 1–18, 2 ('By transnational regulation is meant here regulation that applies to (or is intended to affect directly) non-state agents (individuals, groups, corporate bodies) and is not restricted within the jurisdictional limits of a single nation state').

effect of norms, and the other to the conduct of non-state actors as the object or target of these norms. On the basis of this definition, large parts of international law dealing with inter-state affairs (eg the rules on state responsibility and the law of diplomatic relations) would not be considered as 'transnational law'. International human rights, on the other hand, establishing entitlements for individuals in a multiplicity of states, are 'transnational law'. By using this doctrinal concept of transnational law we are able to flag up some norms (of international or domestic law) as belonging to 'transnational law'.

Second, in giving meaning to the concept of 'transnational legislation', it makes sense to take two distinguishing features of legislation *from the domestic context* as a starting point. These two key elements of the concept of 'legislation' are, first, the 'regulatory' nature of norms (ie understood as abstract-general rules pertaining to the conduct of non-state actors) and, second, the 'authoritativeness' of these norms.⁵⁰ Due to the structural differences of the international legal order, it is not to be expected that the domestic ideal-type concept of 'legislation' can simply be transplanted into the international legal sphere. Rather, it seems worthwhile to look for functional equivalents and approximations.⁵¹

This part addresses the two elements of 'transnational legislation' in turn. Central is the peculiar relationship of this emerging body of law to individuals. It is this relationship that ultimately distinguishes transnational law from (ordinary) international law. It shall be argued that global counter-terrorism law shapes and impacts the 'normative situation of non-state actors', ie their obligations and (still too insignificantly) their rights. The element of cross-border application or effect of the norms is of no concern here. As the article solely deals with global counter-terrorism law (as contained in international legal instruments), this element is fulfilled by definition. The emerging transnational counter-terrorism legislation ultimately gives rise to the problem of 'constitutional gatekeeping' which is considered in the concluding part.

3.1. Regulatory Nature

In what sense does global counter-terrorism law *shape* the normative situation of non-state actors? The concept of 'transnational law', as it was defined above,

50. See Jutta Brunnée, 'International Legislation' (2008) in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (17 June 2014), <www.mpepil.com> (last visited 6 July 2017).

51. In the context of the debate on global constitutionalism and its use of the concept of constitution, this method has been referred to as 'correspondence strategy', see Oliver Diggelmann and Tilmann Altwicker, 'Is There Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism' (2008) 68 *Heidelberg Journal of International Law* 623–50, 637–39.

captures one of the most significant recent developments in international law-making: The turn to the individual. In the context of counter-terrorism, this turn to the individual is of a different nature than, eg, in international human rights law (which also concerns the normative situation of individuals). For the purposes of this article, a norm is considered to 'shape' the normative situation of individuals if it is directed at permitting, proscribing or commanding human conduct. Whereas transnational law in the form of human rights law is of an *enabling* or *agency-enhancing* nature, in the context of counter-terrorism, transnational law is about *controlling* or *restricting* the conduct of non-state actors. This move has been identified by Jacob Katz Cogan as the 'regulatory turn' in international law.⁵² This means that the subjects of international law have in recent times:

at an unprecedented rate entered into agreements, passed resolutions, enacted laws, and created institutions and networks, formal and informal, that impose and enforce direct and indirect international duties upon individuals or that buttress a state's authorities respecting those under and even beyond its territorial jurisdiction.⁵³

Since acts of terrorism are to a large part committed by non-state actors, global counter-terrorism law is a prime example of the 'regulatory turn' in international law.⁵⁴ The 'regulatory' nature is a striking feature of transnational counter-terrorism law. 'Regulatory law' shall be understood here as norms creating *obligations* for non-state actors (private individuals and non-state entities).⁵⁵ Subsequently, 'transnational regulatory law' refers to norms with cross-border application or effect-creating obligations for non-state actors. In principle, there are three instruments used for shaping the normative situation of individuals: law-making treaties, (unilateral) quasi-legislative resolutions, and soft law instruments.

The bulk of transnational regulatory law in the field of counter-terrorism is contained in law-making treaties (transnational regulatory treaty-norms).⁵⁶ As mentioned above, there are currently 14 universal legal instruments and four amendments dealing with counter-terrorism.⁵⁷ Some norms of these

52. See Jacob Katz Cogan, 'The Regulatory Turn in International Law' (2011) 52 *Harvard International Law Journal* 321–72, 346.

53. *Ibid.*, 325.

54. As Katz Cogan rightly stresses, the regulatory turn neither started with counter-terrorism law-making after the 9/11 attacks in the US nor is it, today, limited to it (given the international regulatory activity in fields such as 'environmental law', 'organised crime' and 'violence against women'), see Katz Cogan (n 52) 349–50.

55. Cf Katz Cogan (n 52) 324.

56. On the concept of a law-making treaty see Brunnée (n 50) paras 4–6.

57. See n 3.

suppression conventions relate to the normative situation of individuals, ie they shape the obligations and, much less frequently, rights of non-state actors.⁵⁸ One way in which suppression conventions influence the normative situation of individuals is by requiring states to criminalise certain forms of individual conduct.⁵⁹ Other transnational regulatory norms concern the introduction of particular professional duties (eg, the duty to verify a customer⁶⁰ and the duty to keep records on transactions⁶¹).

The normative situation of individuals is also shaped through *quasi-legislative resolutions* by the Security Council (transnational regulatory resolutions). The three (sole) examples of quasi-legislative resolutions so far, Security Council resolutions 1373 (2001), 1540 (2004), and 2178 (2014) all ultimately target the normative situation of non-state actors in an abstract-general way. Even though they refer to 'states' or 'Member States' as formal addressees,⁶² their content regulates the conduct of non-state actors: For example, Security Council Resolution 1373 (2001) demands the criminalisation of:

the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.⁶³

Similarly, Security Council Resolution 1540 (2004) mandates that states:

... shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear,

58. One may want to read the ambition of designing the normative situation of individuals into norms declaring that '[n]othing in this Convention shall affect *other* rights, obligations and responsibilities of ... individuals under international law ...', for example, International Convention for the Suppression of the Financing of Terrorism art 21, 10 January 2000, 2178 UNTS 239 (emphasis added). See also International Convention for the Suppression of Acts of Nuclear Terrorism art 4(1), 14 September 2005, 2445 UNTS 89.

59. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents art 2(1) & (2), 14 December 1973, 1035 UNTS 167; International Convention against the Taking of Hostages arts 1 and 2, 18 December 1979, 1316 UNTS 205; International Convention for the Suppression of Terrorist Bombings arts 2 and 4, 12 January 1998, 2149 UNTS 256; International Convention for the Suppression of the Financing of Terrorism arts 2 and 4, 10 January 2000, 2178 UNTS 197; International Convention for the Suppression of Acts of Nuclear Terrorism arts 2 and 5, 14 September 2005, 2445 UNTS 89.

60. International Convention for the Suppression of the Financing of Terrorism art 18(1)(b), 10 January 2000, 2178 UNTS 197.

61. International Convention for the Suppression of the Financing of Terrorism art 18(1)(b) (iv), 10 January 2000, 2178 UNTS 197.

62. Couched in the formula of '[d]ecides that all States shall', see SC Res 1373, UN Doc S/RES/1373, 28 September 2001, para 1–2; SC Res 1540, UN Doc S/RES/1540, 28 April 2004, para 2.

63. SC Res 1373, UN Doc S/RES/1373, para 1(b). For another example see *ibid*, para 1(d).

chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them.⁶⁴

Security Council Resolution 2178 (2014), as did Resolution 1373 (2001), even prescribes the type of legislation to be used and the intensity with which states must regulate the prohibited conduct by deciding that all states:

... shall ensure that their domestic laws and regulations establish *serious criminal offenses* sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense.⁶⁵

Apart from the three quasi-legislative resolutions, there are a few other examples of counter-terrorism resolutions where the Security Council (albeit in a more implicit and, above all, non-binding way) undertook to shape the normative situation of individuals.⁶⁶ As Ryan Goodman states, the adoption of Resolution 2178 'solidifies a mode of transnational legal regulation' over counter-terrorism.⁶⁷

Lastly, the normative situation of individuals is, albeit to a lesser extent, also shaped by soft law (transnational regulatory soft law provisions).⁶⁸ Tellingly, the UN General Assembly—a large producer of (non-binding) international soft law—has largely refrained from taking part in the recent transnational regulatory activity.⁶⁹ Of course, resolutions by the General Assembly are non-binding, but they may provide an authoritative interpretation of principles of the UN Charter and, arguably, also other international treaty law.⁷⁰ In its counter-terrorism resolutions, the General Assembly addresses the duties of

64. SC Res 1540, UN Doc S/RES/1540, 28 April 2004, para 2.

65. SC Res 2178, UN Doc S/RES/2178, 24 September 2014, para 6 (emphasis here).

66. Clearly, in SC Res 1624, UN Doc S/RES/1624, 14 September 2005, para 1: 'Calls upon all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to: (a) Prohibit by law incitement to commit a terrorist act or acts; (b) Prevent such conduct; (c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct'.

67. Ryan Goodman, 'The Foreign Fighter Resolution: Implementing a Holistic Strategy to Defeat ISIL' *Just Security Blog* (2014), <justsecurity.org/15721> (last visited 6 July 2017).

68. On the idea of 'international legislative soft law', see Andrew T Guzman and Timothy L Meyer, 'Soft Law' (2014), <http://ssrn.com/abstract=2437956> (last visited 6 July 2017).

69. Historically, however, the UN General Assembly has been a driving force (especially in the 1970s and 1990s) in turning counter-terrorism into an international concern, starting with GA Res 3034(XXVII), UN Doc A/RES/3034(XXVII) (18 December 1972), adopted in the aftermath of the terrorist attacks on the Munich Olympic Games.

70. See Ian Brownlie, *Principles of Public International Law*, 6th edn (Oxford, Oxford University Press, 2003) 14–15.

states (often in a general way),⁷¹ reflects its own role as a coordinator and information provider,⁷² or as an initiator for further law-making,⁷³ but it does not actively take part in *regulatory* transnational law-making.⁷⁴ This may be a wise move, given that the General Assembly has—in the context of counter-terrorism—taken the role of a ‘constitutional gatekeeper’ as will be illustrated below.⁷⁵ Indeed, it seems problematic for one institution to exercise both a regulatory function and a constitutional gatekeeping function.

At the same time, new important actors that create transnational regulatory soft law provisions on counter-terrorism have entered the scene. An example is the Financial Action Task Force (FATF), an intergovernmental body established by the G-7 Summit Group in 1989.⁷⁶ The FATF is an expert-driven transnational legislative network.⁷⁷ The task of the FATF is ‘to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system’, that is the FATF is entrusted with creating international soft law.⁷⁸ A central soft law instrument

71. For example, Measures to Eliminate International Terrorism, GA Res 65/34, para 5, UN Doc A/RES/65/34 (6 December 2010): ‘Reiterates its call upon all States to adopt further measures in accordance with the Charter of the United Nations and the relevant provisions of international law, including international standards of human rights, to prevent terrorism and to strengthen international cooperation in combating terrorism and, to that end, to consider in particular the implementation of the measures set out in paragraphs 3 (a) to (f) of General Assembly resolution 51/210’.

72. *Ibid*, para 3.

73. *Ibid*, para 8: ‘Expresses concern at the increase in incidents of kidnapping and hostage-taking with demands for ransom and/or political concessions by terrorist groups, and expresses the need to address this issue’ (emphasis omitted).

74. One exception can be found in *ibid*, para 9: ‘Urges States to ensure that their nationals or other persons and entities within their territory that wilfully provide or collect funds for the benefit of persons or entities who commit, or attempt to commit, facilitate or participate in the commission of terrorist acts are punished by penalties consistent with the grave nature of such acts’.

75. See Nigel D White, ‘Terrorism, Security and International Law’ in Aidan Hehir et al (eds), *International Law, Security and Ethics: Policy Challenges in the Post-9/11 World* (Oxon, Routledge, 2011) 9, 22.

76. See FATF, <www.fatf-gafi.org/pages/aboutus/> (last visited 6 July 2017). The FATF has—as of November 2013—36 members including two regional organisations. For an overview on FATF, see Yee-Kuang Heng and Kenneth McDonagh, *Risk, Global Governance and Security*, 1st edn (Oxon, Routledge, 2009) 51–78.

77. See Dieter Kerwer and Rainer Hülse, ‘How International Organizations Rule the World: The Case of the Financial Action Task Force on Money Laundering’ (2011) 2 *Journal of International Organizations Studies* 50–67, 55.

78. See FATF website (n 76). On the FATF see Ilias Bantekas, ‘The International Law of Terrorist Financing’ (2003) 97 *American Journal of International Law* 315–33, 319.

for counter-terrorism financing is the FATF Special Recommendations on Terrorist Financing.⁷⁹ Most of the nine recommendations are addressed to ‘states’, but some read clearly as transnational regulatory norms. Special Recommendation no IV illustrates that:

If financial institutions, or other businesses or entities subject to anti-money laundering obligations, suspect or have reasonable grounds to suspect that funds are linked or related to, or are to be used for terrorism, terrorist acts or by terrorist organisations, they should be required to report promptly their suspicions to the competent authorities.⁸⁰

In sum, all three types of global instruments on counter-terrorism (transnational regulatory treaties, resolutions, and soft law) contain abstract-general norms with a regulatory nature that shape the obligations of individuals.

3.2. Authoritativeness

Are transnational regulatory norms on counter-terrorism ‘authoritative’, as is required of them to count as ‘legislation’? In other words, do they *impact* the normative situation of individuals? ‘Authoritativeness’ of norms cannot mean the same in the international as in the domestic context. There is presently no institution on the international level that could make ‘global legislation’, directly imposing obligations on individuals. But, as I shall argue, there is a functional equivalent in the case of counter-terrorism. The functional equivalent of ‘authoritativeness’ is the potential of transnationally created regulatory norms to be considered as ‘self-executing’ norms (or, in the European legal terminology, to have ‘direct effect’) in domestic legal orders. Additionally, an institutional aspect contributing to the ‘authoritativeness’ of transnational counter-terrorism norms is what can be called ‘supervised domestic law-making’. The idea is that, given the seriousness of the terrorist threat and the reasons for international cooperation, the international community has in some cases a valid interest in controlling even the domestic implementation process of transnational norms. ‘Authoritativeness’ of transnational norms, then, becomes a function of the regulatory depth of these norms, their (potential for) self-execution, and the existence of a procedure monitoring their domestic implementation.

3.2.1. Regulatory Depth

The first aspect of ‘authoritativeness’ of transnational norms is their regulatory depth, ie the degree to which transnational norms constrain domestic policy

79. FATF Special Recommendations on Terrorist Financing, <www.fatf-gafi.org/topics/fatfrecommendations/documents/ixspecialrecommendations.html> (last visited 6 July 2016).

80. *Ibid*, IV. See also *ibid*, VI, VII.

choices. In global counter-terrorism law, we find particularly detailed norms setting out internationally preferred policy choices and instruments on the control of individual conduct.⁸¹ Suppression conventions do not only regulate individual conduct through requirements for criminalisation, but they also entail other elaborate state duties regarding the conduct of non-state actors. For example, some conventions oblige states to introduce specific types of sanctions on individuals (such as asset freezing, forfeiture or seizure of funds),⁸² they require states to lay duties on private individuals and institutions and to give them an active role in the prevention of terrorism (such as the strategy of 'know your customer' or reporting obligations),⁸³ or they require states to ensure the alleged offenders' presence for the purpose of prosecution or extradition (in effect a duty to take the offender into custody).⁸⁴ Some parts of transnational regulatory law seek to place particularly detailed duties on individuals. The 1999 International Convention for the Suppression of the Financing of Terrorism may serve as an example where it mandates states to require 'financial institutions to maintain, for at least five years, all necessary records on transactions, both domestic or international'.⁸⁵

There is a clear normative dimension to the question of regulatory depth: How detailed should transnational regulatory norms be? On this question, human rights-inspired reasoning can provide some guidance. The more transnational counter-terrorism law impacts important individual rights (such as the right to liberty or privacy), the more detailed the norms should be in order to satisfy the principle of legality (in particular legal clarity).⁸⁶ Transnational counter-terrorism law currently lives up to this demand only partially. For example, while some formulations used in suppression conventions regarding the elements of terrorist offences (eg of possession of nuclear material, providing terrorist funding) are drafted with sufficiently high precision so as to fulfil the

81. See Katz Cogan (n 52) 338, fn 74.

82. International Convention for the Suppression of the Financing of Terrorism art 8(1) and art 8(2), 10 January 2000, 2178 UNTS 197.

83. International Convention for the Suppression of the Financing of Terrorism art 18(1)(b), 10 January 2000, 2178 UNTS 197.

84. For example, International Convention for the Suppression of Acts of Nuclear Terrorism art 10(2), 14 September 2005, 2445 UNTS 89.

85. International Convention for the Suppression of the Financing of Terrorism art 18(1)(b)(iv), 10 January 2000, 2178 UNTS 197.

86. On a transnational reading of the 'principle of legality' and its requirements, see Anne Peters, *Jenseits der Menschenrechte* (Tübingen, Mohr Siebeck, 2014) 70–81. The principle of legality and the requirement of precision of norms establishing criminal offences is not derogable even in times of emergency, see UN Human Rights Commission, General Comment No 29, para 7, UN Doc CCPR/C/21/Rev.1/Add.11 (2001).

demands of legal clarity,⁸⁷ other formulations are of troubling vagueness (in particular provisions criminalising membership in terrorist organisations).⁸⁸

3.2.2. *Potential for Self-Execution*

The second element of 'authoritativeness' is the quality of norms to be 'self-executing' (or, to be considered as self-executing norms). This leads to a problem of general international law, namely, whether a norm containing international obligations may be enforced domestically (by the courts or the administration) without a preceding implementation act by the legislator.⁸⁹ Generally speaking, the doctrine of self-execution (in most jurisdictions) requires that the international norm must be precise and unconditional.⁹⁰ This can be summarised in the requirement that international norms, in order to be considered directly effective, must be addressed to individuals (or other non-state actors). There are two recent developments in the doctrine of self-execution of international legal norms that are relevant here: First, there seems to be a global increase in the number of norms that are considered to be self-executing. It is true that the wide implications of self-execution as contemplated under EU law are still the exception and cannot be generalised for international law.⁹¹ Nevertheless, as André Nollkaemper has recently outlined, the idea of self-executing international legal norms (albeit in the limited context of rights-conferring international law, not regulatory law as defined here) is gaining ground internationally.⁹² Second, while the traditional doctrine stressed the role of national law and institutions in

87. For example, International Convention for the Suppression of the Financing of Terrorism art 2(1)(b), 10 January 2000, 2178 UNTS 197: 'Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: ... Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act'.

88. See Ben Saul, 'Criminality and Terrorism' in Salinas de Frías et al (n 2) 133, 150–51.

89. See André Nollkaemper, *National Courts and the International Rule of Law* (Oxford, Oxford University Press, 2011) 118. For the doctrine of self-execution (or 'direct effect') in the context of EU law see Joseph Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403–83, 2413–14.

90. See Karen Kaiser, 'Treaties, Direct Applicability' (2008) in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (17 June 2014), <www.mpepil.com> (last visited 6 July 2017).

91. See the famous case C-26/62, *Van Gend en Loos* [1963] ECR 1.

92. Nollkaemper (n 89) 107 (listing global jurisprudence relying on self-execution).

the determination of self-executing international norms, this too seems to change.⁹³ As Anne Peters (among others) has argued, self-execution is also a matter for international law that can—to some extent—be decided upon or prejudged by international courts and tribunals.⁹⁴

Can transnational regulatory norms on counter-terrorism ever be self-executing? Some suppression conventions do contain regulatory provisions that seem clear enough so as to describe in sufficient detail the conduct required of non-state actors. As an example, one may refer to a provision contained in the 1999 International Convention for the Suppression of the Financing of Terrorism which suggests to contracting parties to consider the adoption of the following measure:

Adopting regulations imposing on financial institutions the obligation to report promptly to the competent authorities all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose, without fear of assuming criminal or civil liability for breach of any restriction on disclosure of information if they report their suspicions in good faith.⁹⁵

While the content of this far-reaching regulation that contracting parties are required to adopt is prescribed in detail by the transnational norm (and is further fleshed out by FATF-soft law), it clearly fails to meet the test of unconditionality. Already, the wording shows that domestic implementation legislation is required. Additionally, take the provisions—central to all suppression conventions—on the criminalisation of terrorist acts. Though these criminalising norms set out the terrorist crimes in detail, they cannot be said to be unconditional so as to trigger self-execution: Transnational norms criminalising terrorism are not self-executing because suppression conventions do not pronounce upon the precise *legal consequences* of the offences. Consequently, all suppression conventions contain clauses on domestic (legislative) implementation of the criminalisation provisions.⁹⁶ In other words, suppression conventions are not addressed to individuals (in a formal sense). Indeed, international suppression conventions are—what some would call—‘mediated law’, ie law that has the state as addressee.⁹⁷

93. For the traditional view see Kaiser (n 90) para 6.

94. Peters (n 86) 444 (with references to the literature).

95. International Convention for the Suppression of the Financing of Terrorism art 18(1)(b) (iii), 10 January 2000, 2178 UNTS 197.

96. International Convention against the Taking of Hostages art 2, 18 December 1979, 1316 UNTS 205: ‘Each State Party shall make the offences set forth in article 1 punishable by appropriate penalties which take into account the grave nature of those offences’.

97. Cf Katz Cogan (n 52) 328.

The fact that, currently, most transnational regulatory norms will not be directly effective does not mean, however, that self-execution of these norms must be ruled out on a principled account. The real question is: Should a norm containing an *international obligation for individuals* ever be considered enforceable without a preceding domestic implementation act?

There are good arguments against self-execution of transnational regulatory norms. Other than in the case of self-executing individual human rights, in the situation of transnational regulatory norms individual conduct is restricted or controlled by virtue of transnational law. Thus, the options for individual agency are reduced (and not increased as in transnational human rights law). If one does not want to argue on the basis of duties derived from human rights to protect other individuals (through self-executing transnational regulatory norms), a rights-based argument for self-execution of regulatory norms is difficult to make.

There are, however, some more sympathetic voices on the self-execution of transnational regulatory treaty norms. While it seems clear that self-execution of transnational regulatory norms must remain the exception, it should not be discarded too early. In particular, self-executing transnational regulatory norms seem less problematic outside the context of criminal law.⁹⁸ In the context of counter-terrorism, two situations in particular come to mind: The first is when transnational norms establish (civic) obligations of individuals, eg reporting obligations or due diligence requirements. The second situation where self-execution may be contemplated is when transnational norms require states to take concrete measures vis-à-vis individuals, eg preventing the entry or transit of (suspected) foreign terrorist fighters. Anne Peters has convincingly argued that international treaties may only be interpreted to confer obligations on individuals under the following restrictive conditions: First, the text must be clear on the question of conferring (precise and unconditional) obligations on individuals so as to satisfy the principle of legality. Second, self-execution must serve the purpose of safeguarding important legal interests, and third, there must be a heightened risk for a deficient implementation and enforcement in domestic law.⁹⁹ In favour of self-executing (sufficiently precise and unconditional) transnational regulatory norms, one could argue along similar lines as for the self-execution of rights-conferring transnational norms. First, self-executing regulatory norms would both increase the effectiveness and the importance of transnational law.¹⁰⁰ Domestic law enforcement agencies would be more actively drawn

98. I am grateful to Anne Peters for referring me to this point.

99. Peters (n 86) 79.

100. See John H Jackson, ‘Status of Treaties in Domestic Legal Systems: A Policy Analysis’ (1992) 86 *American Journal of International Law* 310–40, 322.

into the transnational legal process and the awareness for transnational public security law would be raised. Self-execution could contribute to enhancing compliance with suppression conventions since more domestic actors would be directly involved in applying transnational norms (courts, administration). Second, in some cases self-execution may make resorting to the inherently problematic instrument of transnational regulatory resolutions (by the Security Council) unnecessary. If the international community could be sure that (some) transnational regulatory treaty norms automatically become part of the 'law of the land', there would be less need for imposing these norms by the Security Council through quasi-legislative resolutions. Third, self-execution could lead to greater consistency between transnational obligations and national law, 'without their meaning being lost in translation'.¹⁰¹

What about self-executing provisions in transnational quasi-legislative resolutions by the Security Council? Can (or must) quasi-legislative resolutions by the Security Council be given direct domestic effect? Most resolutions by the Council—already by their wording—require the government to take additional steps of implementation.¹⁰² This problem is of practical relevance: If norms contained in quasi-legislative resolutions were self-executing, they could act as a 'legal basis' for restrictions of human rights.¹⁰³ Some authors reject this: Nigel White has claimed that quasi-legislative resolutions are not 'supranational legislation' with direct domestic effect.¹⁰⁴ However, it is not clear why quasi-legislative resolutions could never be treated as being self-executing.¹⁰⁵ There seems to be no general or principle-based argument that would completely bar any self-execution of transnational regulatory norms contained in Security Council resolutions. That self-execution of regulatory

101. See Nollkaemper (n 89) 118.

102. Nico Krisch, 'Art. 41' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary on the UN Charter*, 2nd edn (Oxford, Oxford University Press, 2012) 1325.

103. See, eg, European Convention on Human Rights and Fundamental Freedoms art 8–11, 4 November 1950, 213 UNTS 222, ETS No 5 requiring that the interference be 'prescribed by law'. The question whether SC Res 757, UN Doc S/RES/757 (30 May 1992) (and amending resolutions) against Serbia were self-executing and could be used as a legal basis in Irish law for restricting the right to freedom of possession was at issue in *Bosphorus Hava Yollari v Ireland*, Application no 45036/98, European Court of Human Rights, Grand Chamber, Judgment (30 June 2005) para 107. On the problem of domestic implementation of a Security Council resolution and the correct identification of a 'legal basis' for interferences with Convention rights see also *Nada v Switzerland*, Application no 10593/08, European Court of Human Rights, Grand Chamber, Judgment (12 September 2012) para 173.

104. White (n 2) 72.

105. For a position favourable to the possibility of directly effective Security Council resolutions see Peters (n 86) 452–53 (limiting the discussion to the situation of 'targeted sanctions').

resolutions cannot be excluded does not, however, mean that there are good reasons to embrace such an effect either. In my view, one focal point of the discussion must be—in analogy to the situation in international treaty law—the quality (regulatory depth, precision and unconditionality) of the norms. Though norms contained in quasi-legislative resolutions are not 'treaty law' in the strict sense of the term, they may be addressed as 'secondary treaty norms' and—with some modification—they should be subjected to similar criteria regarding self-execution.¹⁰⁶ The decisive question is whether regulatory norms contained in quasi-legislative resolutions are sufficiently precise and unconditional. For the two early quasi-legislative resolutions, 1373 (2001) and 1540 (2004), this needs to be rejected. The wording of these resolutions reflects the necessity for further implementation measures, eg when stating that laws should be adopted in accordance with the appropriate domestic procedures.¹⁰⁷ Additionally, apart from the absence of a statement on the legal consequences of terrorist offences, the high level of precision required for a legal norm which could serve as a legal basis in criminal proceedings is clearly not met by any provision in the two early quasi-legislative resolutions.¹⁰⁸ Furthermore, the existence of special regimes monitoring the implementation of the quasi-legislative resolutions ('supervised domestic law-making') supports the finding that these resolutions are not designed to have direct domestic effect.¹⁰⁹ However, a provision that would be a candidate for self-execution is para 8 of the recent UN Security Council Resolution 2178 (2014) that reads as follows:

Decides that, without prejudice to entry or transit necessary in the furtherance of a judicial process, including in furtherance of such a process related to arrest or detention of a foreign terrorist fighter, Member States shall prevent the entry into or transit through their territories of any individual about whom that State has credible information that provides reasonable grounds to believe that he or she is seeking entry into or transit through their territory for the purpose of participating in the acts described in paragraph 6, including any acts or activities indicating that an individual, group, undertaking or entity is associated with Al-Qaida, as set out in paragraph 2 of resolution 2161 (2014), provided that nothing in this paragraph

106. Anne Peters, 'Art. 25' in Bruno Simma et al (n 102) 47.

107. SC Res 1540, UN Doc S/RES/1540, 28 April 2004, para 2.

108. See Andrea Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion' (2006) 17 *European Journal of International Law* 881–919, 892–903 (relying on an analysis of country reports under resolutions 1267 and 1373).

109. SC Res 1373, UN Doc S/RES/1373, para 6; SC Res 1540, UN Doc S/RES/1540, 28 April 2004, para 4.

shall oblige any State to deny entry or require the departure from its territories of its own nationals or permanent residents ...¹¹⁰

In my view, this provision is clear and precise enough to be considered self-executing in the Member States. In particular, the provision does not require further legislative action by the Member States, the negative obligation (ie denial of entry or transit) by the state is sufficiently determined, and the group of persons the normative situation of whom the resolution regulates is also precisely stated in the resolution text. Regarding its potential for self-execution, Resolution 2178 (2014) is a remarkable step forward as compared to the previous two quasi-legislative resolutions. It will be interesting to see whether a state will in the future deny entry to an individual solely on the basis of para 8 of Resolution 2178 (2014). In sum, the possibility of self-executing quasi-legislative resolutions by the Security Council cannot be excluded on the level of principle. While most norms contained in the quasi-legislative resolutions so far will not be considered self-executing and in most cases will require the adoption of domestic legislation, there is at least one provision in the recent Resolution 2178 (2014) that fulfils the requirements for self-execution.

Finally, the question arises whether there is anything similar to self-execution of transnational regulatory soft law. A legal concept that has 'family resemblance' with self-execution is that of 'consistent interpretation'.¹¹¹ In the context of an emerging transnational legislation on counter-terrorism, this raises the question whether domestic courts and administrations may refer to transnational regulatory soft law when interpreting (domestic) obligations of non-state actors, in effect 'harmonising' obligations contained in domestic law with transnational law.¹¹² As transnational soft law instruments, like the FATF Special Recommendations, specify and in some ways complement both transnational regulatory treaty-norms and transnational regulatory resolutions, it cannot be excluded that domestic courts and administrations may consult these for the purpose of facilitating consistent interpretation of domestic and transnational law.¹¹³

In sum, on the one end there are good arguments against self-execution of either treaty-based or quasi-legislative resolution-based transnational regulatory norms. This applies in the case of a criminal law context where the requirements of legal certainty and non-retroactivity are of great concern. On the other end, however, there are fields of counter-terrorism (eg controlling the conduct of financial institutions and other areas of prevention) where a restrictive application of the doctrines of self-execution and, as a part of it, consistent interpretation, may contribute to more efficient transnational law enforcement.

While many global counter-terrorism norms are of a regulatory nature and in some cases have a remarkable regulatory depth, the majority of these norms is, at present, not unconditional and therefore lacks the potential for self-execution. This is, of course, not to say that these norms are without authoritativeness. It is rather that they have not been given the full authoritativeness transnational law could ultimately assume. Thus, the more transnational law impacts the normative situation of individuals (eg through consistent interpretation, as model laws, and maybe in the future through self-execution), the more manifest the legislative character of global counter-terrorism law becomes. In this sense, one may speak of the emergence of transnational counter-terrorism legislation.

3.2.3. *Supervised Domestic Law-Making*

The authoritativeness of transnational norms depends upon the intensity with which these norms impact the normative situation of individuals. If transnational regulatory norms are considered self-executing (which, for the time being, is likely to remain the exception), the impact on the normative situation of individuals is high. Self-execution still concerns an issue to be settled mainly by domestic authorities (though this is increasingly disputed). Consequently, the influence of the international community on this issue is low. Given the important reasons for ensuring cooperation of each member of the international community outlined above (in particular, in weakest link situations), there is a strong international interest in ensuring that the transnational regulatory norms on counter-terrorism are not 'watered down' and actually become part of the domestic legal orders. For this purpose, international procedures for 'supervised domestic law-making' were created. While the authoritativeness of transnational regulatory norms does not depend on it, the existence of such a procedure enhances the authoritativeness (and, thereby the efficiency) of these norms.

In relation to international suppression conventions, the UN Office on Drugs and Crime (its Terrorism Prevention Branch, to be exact) offers

110. SC Res 2178, UN Doc S/RES/2178, 24 September 2014, para 8 (emphasis in the original).

111. Some deny that 'consistent interpretation' can be distinguished from the issue of direct effect (or self-execution), see Nollkaemper (n 89) 110.

112. In the EU law context, there is a 'duty to consistent interpretation' even with regard to EU soft law. See case C-322/88, *Salvatore Grimaldi v Fonds des maladies professionnelles* [1989] ECR 4407, para 18.

113. This is the case eg in the Netherlands. See Joseph Fleuren, 'The Application of Public International Law by Dutch Courts' (2010) 57 *Netherlands International Law Review* 245–66, 250 (with references to Dutch case law).

‘technical assistance’ concerning the ‘ratification, legislative incorporation and implementation of the universal legal framework against terrorism’.¹¹⁴ The Office on Drugs and Crime is a large distributor of transnational legal norms on counter-terrorism. It assists states, upon their request, on how to implement the transnational counter-terrorism norms by providing, eg, ‘best practices’ and ‘model laws’.¹¹⁵

In relation to UN Security Council resolutions, ‘supervised domestic law-making’ is institutionalised to an even greater degree. The idea of monitoring the implementation of transnational counter-terrorism legislation in the Member States was introduced by UN Security Council Resolution 1373 (2001). In this Resolution, the Council set up the Counter-Terrorism Committee (CTC) to supervise the domestic implementation process.¹¹⁶ The CTC has a range of tools at its disposal to fulfil its supervisory mandate, eg country visits, technical assistance, and country reports.¹¹⁷ The method of supervised domestic law-making was also used for transnational norms concerning the prevention of terrorists’ access to nuclear, chemical or biological weapons and for transnational norms concerning the incitement to commit a terrorist act or acts.¹¹⁸ In the latest quasi-legislative Resolution 2178 (2014) concerning foreign terrorist fighters, the Security Council did not establish a monitoring procedure. This might negatively impact the authoritativeness of the transnational norms contained in it, and thereby the efficiency of this increasingly important part of the transnational counter-terrorism legislation.

A monitoring procedure to supervise domestic law-making also exists with regard to some transnational regulatory soft law instruments. A well-known example is the FATF ‘peer reviewing’ or ‘mutual evaluation’ mechanism. Its purpose is to ‘determine the degree of technical compliance, implementation and effectiveness of systems to combat ... the financing of terrorism’.¹¹⁹

114. See <www.unodc.org/unodc/en/terrorism/index.html> (last visited 7 July 2017). See also Technical assistance for implementing the international conventions and protocols related to counter-terrorism, GA Res 68/187, UN Doc A/RES/68/187 (11 February 2014).

115. See <www.unodc.org/unodc/en/terrorism/technical-assistance-tools.html#Studies> (last visited 7 July 2017).

116. See SC Res 1373, UN Doc S/RES/1373, para 6. It should be noted that the duty to report is couched in (formally) non-binding terms.

117. See <www.un.org/en/sc/ctc/> (last visited 7 July 2017).

118. SC Res 1540, UN Doc S/RES/1540, 28 April 2004, para 4; SC Res 1624, UN Doc S/RES/1624, 14 September 2005, para 5.

119. *Financial Action Task Force Mandate* (2012–2020), para 3(c), FATF (20 April 2012) <www.fatf-gafi.org/topics/fatfgeneral/documents/ministersrenewthemandateofthefinancialactiontaskforceuntil2020.html> (last visited 7 July 2017).

For example, the 2014 Mutual Evaluation Report on Canada stressed that Canada had sufficiently addressed the deficiencies regarding Customer Due Diligence by amendments of its criminal law legislation and could be removed from the regular follow-up process.¹²⁰ Apart from the mutual evaluations of the Member States’ law and law enforcement of FATF rules, the organisation is engaged in identifying ‘high-risk, non cooperative jurisdictions and those with strategic deficiencies in their national regimes, and coordinating action to protect the integrity of the financial system against the threat posed by them’.¹²¹ Presently, the FATF has identified two non-compliant states, Iran and the Democratic Republic of North Korea, and called on its members and other jurisdictions to apply counter-measures in these cases. Regarding Iran, the FATF recently urged to start ‘criminalising terrorist financing and effectively implementing suspicious transaction reporting requirements’.¹²²

In sum, ‘supervised domestic law-making’ has become a useful tool of the international community (or of some less inclusive groups such as the FATF Member States) to monitor domestic legislative processes. Supervised domestic law-making is a way to prevent external effects of non-harmonised domestic laws and to handle the weakest link problem. It enhances the authoritativeness of transnational regulatory norms in key fields such as counter-financing of terrorism.

3.3. Constitutional Gatekeeping

As transnational counter-terrorism legislation advances, so does the need for what I call ‘constitutional gatekeeping’. Obviously, constitutional gatekeeping can take on many forms. The paradigm case of constitutional gatekeeping is judicial review, by having a court determine with final say what is in conformity with the constitution and may properly be applied as ‘the law of the land’. However, there may be other forms of ensuring the conformity of transnational legislation with constitutional principles (discussed below). ‘Constitutional gatekeeping’ is understood here as the function of monitoring ‘regulatory law’ on the basis of ‘constitutional principles’ (most importantly, human rights). By ‘constitutional principles’ I mean legal principles commonly established on the constitutional level or of a constitutional

120. *Mutual Evaluation of Canada: 6th Follow-up Report*, FATF (27 February 2014) <www.fatf-gafi.org/countries/a-c/canada/documents/fur-canada-2013.html> (last visited 7 July 2017).

121. FATF Mandate (n 119) para 3(d).

122. *Public Statement*, FATF (24 October 2014) <www.fatf-gafi.org/countries/d-i/democratic-peoples-republic-of-korea-dprk/documents/public-statement-oct2014.html#iran> (last visited 7 July 2017).

provenience, such as primarily human rights, principles of governance (rule of law, good governance norms) and principles on the political process (representation of interests and participation). As such, constitutional principles are 'general and important norms whose main function is the attribution of the binary qualification of legal/illegal in light of overarching values'.¹²³ This task becomes more complicated with transnational regulatory law where obligations of individuals (at least partially) originate in 'foreign' or 'international' law or—even more complicated—in (often non-transparent, exclusive) legislative networks.¹²⁴ The problem of 'constitutional gatekeeping' raises some fundamental questions: What arguments can be made on a level of principle that 'constitutional gatekeeping' is necessary in the case of transnational legislation on counter-terrorism? How do existing transnational regulatory norms relate to constitutional principles (such as human rights)? Which institution should exercise 'constitutional gatekeeping' on transnational regulatory norms?

One objection that could be raised here is that 'constitutional gatekeeping' is unnecessary because transnational regulatory law is only 'mediated law' and that, therefore, individuals are not really directly affected by these norms. However, as shown above, the 'authoritativeness' of transnational regulatory norms is increasing (through greater regulatory depth, self-execution or supervised domestic law-making). Consequently, the margin of implementation for states and regional organisations (such as the EU) diminishes. As an example, take again the provision in the 1999 International Convention for the Suppression of the Financing of Terrorism that suggests that contracting parties require 'financial institutions to maintain, for at least five years, all necessary records on transactions'.¹²⁵ Particularly in cases where transnational regulatory norms seek to establish a common standard by setting minimum level requirements, the margin of legislative discretion in implementation decreases significantly. As Jacob Katz Cogan argues, the gap between 'mediated law' and 'unmediated law', ie the discrepancy between international norms that are directly effective and those that are not, continues to decrease.¹²⁶ Furthermore, some transnational counter-terrorism norms are vague and leave discretion to the states as to how they should be

123. Armin von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field' (2008) 9 *German Law Journal* 1909–38, 1912 (referring to Martti Koskeniemi, 'General Principles: Reflexions on Constructivist Thinking in International Law' in Martti Koskeniemi (ed), *Sources of International Law* (Dartmouth, Ashgate, 2000) 359, 368 *et seq*).

124. On transnational legislative networks, see section 4.3 below.

125. International Convention for the Suppression of the Financing of Terrorism art 18(1)(b)(iv), 10 January 2000, 2178 UNTS 197.

126. Katz Cogan (n 52) 349.

implemented.¹²⁷ If there is no guidance concerning their implementation in a way conforming to human rights, there is the danger that transnational counter-terrorism law may be abused by some states (eg for crackdowns on journalists, bloggers or human rights activists).¹²⁸ In sum, as transnational regulatory norms can affect the normative situation of non-state actors, constitutional gatekeeping becomes imperative.

Despite the need to make transnational regulatory law comply with constitutional principles, current practice does not look so bright. It can be noted, though, that suppression conventions today refer to human rights and 'subjective international rights'.¹²⁹ Regarding transnational regulatory treaty law, a few examples shall suffice. The early suppression conventions, such as the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons and the 1979 International Convention against the Taking of Hostages, contained 'subjective international rights' for alleged offenders: For example, detained alleged offenders should be granted consular rights, such as '[t]o communicate without delay with the nearest appropriate representative of the State of which he is a national ...'¹³⁰ or the right to be visited by a state representative.¹³¹ Human rights protection in these early suppression conventions was addressed rather vaguely in general terms as a state duty to grant 'fair treatment'.¹³² A step towards transnationalisation was taken with the 1997 International Convention for the Suppression of Terrorist Bombings, requiring that:

[a]ny person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity

127. See Saul (n 88) 150–51.

128. See 'Ethiopia: Pillay condemns crackdown on journalists, increasing restrictions on freedom of expression, UN High Commissioner for Human Rights', <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14555&LangID=E> (last visited 12 July 2017).

129. On the conception of the 'subjective international right', see Anne Peters, 'Das subjektive internationale Recht' (2011) 59 *Jahrbuch des öffentlichen Rechts der Gegenwart* 411–56.

130. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons art 6(2)(a), 14 December 1973, 1035 UNTS 167; International Convention against the Taking of Hostages art 6(3)(a), 18 December 1979, 1316 UNTS 205.

131. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons art 6(2)(b), 14 December 1973, 1035 UNTS 167; International Convention against the Taking of Hostages art 6(3)(b), 18 December 1979, 1316 UNTS 205.

132. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons art 9, 14 December 1973, 1035 UNTS 167. Tellingly, the content of 'fair treatment' is to be determined by domestic human rights, see International Convention against the Taking of Hostages art 8(2), 18 December 1979, 1316 UNTS 205.

with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights.¹³³

It is clear, however, that these rights-related provisions target potential human rights violations on the implementation level only—the creation of transnational law itself is not covered. A cautious sign that all counter-terrorism efforts, be it on the national or the transnational level, must conform to international human rights is contained in the ‘Draft Comprehensive Convention against International Terrorism’ (not in force), where the Preamble in general terms recalls the ‘necessity of respecting human rights and international humanitarian law in the fight against terrorism’.¹³⁴ If one accepts (which is far from settled) that there is a ‘normative hierarchy’ in international law,¹³⁵ some provisions in recent suppression conventions may be interpreted as providing for the supremacy of constitutional principles over (regulatory) treaty law.¹³⁶ This constitutionalist interpretation is, however, highly presumptive. The following can be gathered from the rather weak commitment to constitutional principles in the field of transnational regulatory treaty norms: If international law continues to embark on transnational regulatory law-making, the need to integrate human rights is reinforced. This integration of human rights can be facilitated in two ways.¹³⁷ A first (‘vertical’ or ‘constitutionalist’) way of integrating human rights is to establish a hierarchy of transnational human rights over transnational regulatory law. For example, transnational regulatory treaties and resolutions

133. International Convention for the Suppression of Terrorist Bombings art 14, 12 January 1998, 2149 UNTS 256. For similar provisions, see International Convention for the Suppression of the Financing of Terrorism art 17, 10 January 2000, 2178 UNTS 197; International Convention for the Suppression of Acts of Nuclear Terrorism art 12, 14 September 2005, 2445 UNTS 89.

134. Draft Comprehensive Convention against International Terrorism Preamble, UN Doc A/RES/59/894, Appendix II (12 August 2005).

135. On the problem of ‘normative hierarchy’ in international law, see Martti Koskeniemi, ‘Hierarchy in International Law: A Sketch’ (1997) 8 *European Journal of International Law* 566–82; Dinah Shelton, ‘Normative Hierarchy in International Law’ (2006) 100 *American Journal of International Law* 291–323.

136. For eg. International Convention for the Suppression of the Financing of Terrorism art 21, 10 January 2000, 2178 UNTS 197: ‘Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions.’

137. The UN has been actively pursuing a better integration or streamlining of international human rights law and counter-terrorism. See, recently, the ‘rights-centred approach to counter-terrorism’ announced by the UN Secretary-General, ‘Threats to International Peace and Security Caused by Terrorist Acts’, S/PV.7316, 3/83 (19 November 2014). I am grateful to an anonymous referee for drawing my attention to this.

could state that human rights have supremacy over the regulatory norms. This approach would make the most sense if there was a (world) court that could balance transnational regulatory norms and abstract transnational human rights norms. However, unspecific reference to human rights obligations may not prove to be very helpful. In the absence of a world court, it must be feared that there will not be a consistent practice among the courts (adjudicating on how to balance human rights and transnational counter-terrorism norms). Thus, a second (‘horizontal’) option of how to add human rights to the calculus can be contemplated.¹³⁸ The transnational legal instrument (treaties, resolutions or soft law) should specify either in the text itself or in an accompanying legal instrument in sufficient detail how exactly human rights are implicated by specific regulatory issue. For example, it could be spelled out—already at the transnational level—what limits the right to freedom of association sets for regulatory norms on material support.¹³⁹

Similar considerations apply to law-making by the Security Council. It is known that transnational regulatory resolutions by the Security Council and constitutional principles cannot be squared easily. The initial quasi-legislative Resolution 1373 (2001) did not mention any duty to observe human rights (except in the very specific context of granting refugee status to asylum-seekers).¹⁴⁰ What is missing in this Resolution is the general pronouncement that domestic counter-terrorism measures must comply with international human rights standards. The false start induced some actors to regard human rights as a matter to be separated from global counter-terrorism. It is symptomatic that the CTC, which is to monitor state compliance with Resolution 1373 (2001), in the beginning viewed any human rights considerations to be outside the scope of its mandate.¹⁴¹ Once human rights were off the international agenda in the fight against terrorism, it proved difficult to introduce them. The Security Council reacted to severe criticism by adopting Resolution 1566 (2004) reminding states to ensure that:

any measures taken to combat terrorism comply with all their obligations under international law, and [that the states] should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.¹⁴²

138. I am grateful to Guy Harpaz for suggesting that to me.

139. Of course, even this ‘horizontal’ solution would ultimately require some kind of review mechanism.

140. SC Res 1373, UN Doc S/RES/1373, para 3(f).

141. See Kim Lane Scheppele, ‘Global Security Law and the Challenge to Constitutionalism after 9/11’ (2011) 2 *Public Law* 353–77, 369 (quoting Sir Jeremy Greenstock, the first head of the CTC); see also EJ Flynn, ‘The Security Council’s Counter-Terrorism Committee and Human Rights’ (2007) 7 *Human Rights Law Review* 371–84.

142. SC Res 1566, UN Doc S/RES/1566 (8 October 2004), Preamble.

In quasi-legislative resolutions, reference to human rights has only been made in the Preamble, but not in operative paragraphs.¹⁴³ As in the case of treaty-law, the problem remains of how to guarantee international human rights already on the level of transnational law-making. This touches upon the widely discussed problem (that is outside the scope of this article) of whether the Security Council is bound by international human rights.¹⁴⁴ If one (as I do) accepts that the Security Council must obey international human rights, then the problem of ‘constitutional gatekeeping’ on the transnational level arises in full sway.

If some form of transnational ‘constitutional gatekeeping’ is desirable or even necessary, who should perform it? The first actor that comes to mind is domestic courts. In the case of transnational regulatory treaty-norms, domestic courts are in the comfortable position of denying self-execution of norms they consider problematic on a constitutional principle. In effect, domestic courts can use the concept of self-execution ‘as a shield’ against treaty-norms to ‘protect domestic political organs and, more generally, domestic values’ simply by rejecting one of the conditions of self-execution.¹⁴⁵ However, it is questionable whether ‘constitutional gatekeeping’ on the domestic level is a feasible solution in practice. It cannot be ruled out that some states are ‘pressed’ to change their laws by powerful transnational actors (states or international organisations).¹⁴⁶ For example, the US imposes ‘special measures’ on states that are unwilling to participate in the global fight against counter-financing of terrorism.¹⁴⁷ The threat of being cut off from access to the US banking

143. But see SC Res 1624, UN Doc S/RES/1624, 14 September 2005, para 4 (this Resolution was, however, not adopted under Ch VII of the UN Charter).

144. For a thorough discussion see Peters (n 106). The UN Security Council is included in the recent process of streamlining UN counter-terrorism efforts and human rights, see again the ‘rights-centered approach to counter-terrorism’ by the UN Secretary General, Threats to International Peace and Security Caused by Terrorist Acts, S/PV.7316, 3/83 (19 November 2014). I am grateful to an anonymous referee for pointing this out to me.

145. Nollkaemper (n 89) 115–7, 121–4 (making clear that the question of self-execution is not a ‘politics-free zone’).

146. Terence Halliday and Bruce Carruthers have described how international financial institutions pressed Indonesia to bring its bankruptcy law in conformity with international standards, see Terence C Halliday and Bruce G Carruthers, ‘The Recursivity of Law: Global Norm Making and National Law-Making in the Globalization of Corporate Insolvency Regimes’ (2007) 112 *American Journal of Sociology* 1135–1202, 1154–62. For the role of transnational standards in the reform of China’s law of criminal procedure, see Sida Liu and Terence C Halliday, ‘Recursivity in Legal Change: Lawyers and Reforms of China’s Criminal Procedure Law’ (2009) 34 *Law and Social Inquiry* 911–50.

147. Mariano-Florentino Cuéllar, ‘The Mismatch between State Power and State Capacity in Transnational Law Enforcement’ (2004) 22 *Berkeley Journal of International Law* 15–58, 38.

system has proven to be a powerful tool to ensure that states adopt transnational rules on counter-financing. In this situation, it also seems unlikely that ‘constitutional gatekeeping’ by domestic courts would have enough ‘bite’. Similar problems arise in the case of Security Council law-making: In the absence of an example of a provision contained in a quasi-legislative resolution that was given direct domestic effect, it can only be speculated whether domestic courts would engage in prior constitutional review of transnational regulatory norms. Some domestic, regional and international courts have struggled hard with exercising ‘constitutional gatekeeping’ in relation to targeted sanctions by the Security Council.¹⁴⁸ The task is not easier in relation to norms that enter the national sphere as rules originating in transnational regulatory resolutions. In all likelihood, domestic courts will be deferential to transnational regulatory law by the Security Council. It suffices to say that, presently, it cannot be taken for granted that constitutional concerns about transnational counter-terrorism legislation will necessarily find a forum at the domestic level.

It is important to note, therefore, that some form of ‘constitutional gatekeeping’ should already exist at the transnational level. A potential candidate is the UN General Assembly. The General Assembly acts as a ‘constitutional gatekeeper’ vis-à-vis the states. In this regard, the General Assembly regularly reminds states to observe ‘international human rights, refugee and humanitarian law’ when implementing counter-terrorism measures in domestic law.¹⁴⁹ The General Assembly also pointed to the ‘obligation of States ... to respect certain rights as non-derogable in any circumstances’, making clear that counter-terrorism measures can never be treated as a human rights-free zone.¹⁵⁰ In particular, the General Assembly uses four means to carry out its ‘constitutional gatekeeping’ function: It points to absolute prohibitions (deriving from international human rights),¹⁵¹ it outlines state obligations flowing from international human rights in specific, recurrent counter-terrorism situations (eg deprivation of liberty, border control, extradition, profiling, interrogation)¹⁵² and it stresses the importance of particular

148. Some courts followed a deferential approach concerning ‘targeted sanctions’ by the Security Council, eg the Swiss Federal Court (*Nada*) and the General Court of the EU (*Kadi*). For an overview see Machiko Kanetake, ‘The Interfaces between the National and International Rule of Law: The Case of UN Targeted Sanctions’ (2012) 9 *International Organizations Law Review* 267–338.

149. See Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, GA Res 65/221, UN Doc 65/221, 5 April 2011, para 4.

150. *Ibid*, para 5.

151. *Ibid*, para 6(a), (c), (d).

152. *Ibid*, para 6(b), (h), (j), (k), (m), (n).

international human rights in counter-terrorism (eg right to equality before the law, right to a fair trial, right to privacy, non-refoulement, right to an effective remedy and reparation, right to due process).¹⁵³ Lastly, the General Assembly also stresses—in a truly transnational spirit—general conditions for domestic counter-terrorism legislation: It ‘urges States, while countering terrorism ... [t]o ensure that their laws criminalizing acts of terrorism are accessible, formulated with precision, non-discriminatory, non-retroactive and in accordance with international law, including human rights law’.¹⁵⁴ The General Assembly potentially also acts as a ‘constitutional gatekeeper’ vis-à-vis the other UN organs, in particular the Security Council. In its resolution on the ‘Protection on Human Rights and Fundamental Freedoms while Countering Terrorism’, the General Assembly stated:

the need to continue ensuring that fair and clear procedures under the United Nations terrorism-related sanctions regime are strengthened in order to enhance their efficiency and transparency, and welcomes and encourages the ongoing efforts of the Security Council in support of these objectives, including by establishing an office of the ombudsperson and continuing to review all the names of individuals and entities in the regime, while emphasizing the importance of these sanctions in countering terrorism.¹⁵⁵

However, all of these statements are rather weak and are far from any real monitoring of transnational regulatory law. It seems that the UN General Assembly has not exploited its full potential as a meaningful ‘constitutional gatekeeper’ yet.¹⁵⁶ Other potent ‘constitutional gatekeepers’ (such as a world court) are currently not in sight. One may, however, contemplate an emerging transnational public or transnational civil society (eg in the form of non-governmental organisations, internet fora, and international news media) exercising (additional) ‘constitutional gatekeeping’ functions. It is one benefit of transnational law to allow for the inclusion of private actors both in the law-making as well as, arguably, in the monitoring process. In sum, ‘constitutional gatekeeping’ on the transnational level—while ever more important given the increase of transnational regulatory instruments—is largely absent at present.

153. *Ibid*, para 6(e), (f), (i), (o), (p).

154. *Ibid*, para 6(l). See also *ibid*, para 6(q): ‘To shape and implement all counter-terrorism measures in accordance of gender equality and non-discrimination.’

155. *Ibid*, para 9.

156. For criticism of the role of UN General Assembly in counter-terrorism see White (n 2) 62.

4. Techniques for the Creation of Transnational Counter-Terrorism Legislation

If international law-making is one (certainly important) way to cooperate, and given the reasons for international cooperation on counter-terrorism in particular, how does the international community create a ‘transnational legislation’ on counter-terrorism? It is not an institutional analysis on actors and procedures that shall be undertaken here. Instead, this part deals on a more abstract level with transnational law-making relying on the elements of ‘transnational legislation’ outlined in Part 3. What are the techniques of law-making in the field of global counter-terrorism employed by the international community?

4.1. Harmonisation of (Domestic) Norms on Counter-Terrorism

One technique of international law-making is ‘harmonisation’. By ‘harmonisation’ I mean the reduction of differences between legal norms of different (national) origin through a binding legal act with cross-border application. The typical instrument for harmonisation of domestic and international norms is an international treaty. The level of harmonisation envisaged by the international legal norm may vary, ranging from ‘minimum harmonisation’ to ‘full harmonisation’ or ‘unification’.¹⁵⁷ Outside special legal regimes (like the EU) international law-making by harmonisation is a consensual, non-hierarchical type of cooperation.¹⁵⁸

From the twentieth century onwards, the idea of harmonisation has no longer been limited to private law, but today relates to all sorts of legal fields, such as labour law (especially work health and safety laws),¹⁵⁹ environmental law,¹⁶⁰ health law,¹⁶¹ etc. Harmonisation of criminal law has become an issue

157. See Martin Gebauer, ‘Unification and Harmonization of Laws’ in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2008) 24 (17 June 2014), <www.mpepil.com> (last visited 7 July 2017).

158. See Katharina Holzinger and Christoph Knill, ‘Causes and Conditions of Cross-National Policy Convergence’ (2005) 12 *Journal of European Public Policy* 775–96, 782.

159. Junji Nakagawa, *International Harmonization of Economic Regulation* (Oxford, Oxford University Press, 2011) 169–87.

160. Katharina Holzinger et al, ‘Environmental Policy Convergence: The Impact of International Harmonization, Transnational Communication, and Regulatory Competition’ (2008) 62 *International Organization* 553–87.

161. On the need to internationally harmonise public health standards, see David P Fiedler, ‘A Globalized Theory of Public Health Law’ (2002) 30 *The Journal of Law, Medicine & Ethics* 150–61, 153. Similarly, Lawrence O Gostin and Allyn L Taylor, ‘Global Health Law: A Definition and Grand Challenges’ (2008) 1 *Public Health Ethics* 53–56, 61.

as well.¹⁶² In particular, the objective of harmonisation of counter-terrorism law has resulted in significant efforts by states in the past decade.¹⁶³ In the EU, this objective has found its clearest expression in the 'Framework Decision on Counter-Terrorism' of 2002, the purpose of which is to introduce minimum rules concerning terrorist offences in the EU Member States.¹⁶⁴ Some European institutions continue to pressure for more harmonisation of domestic counter-terrorism law.¹⁶⁵

At the international level, the harmonisation of counter-terrorism law is less openly framed as an objective of international law-making. Nevertheless, harmonisation is at least partially the *result* of international law-making processes. The tendency of harmonisation can be noted when consulting the US Country Reports on Terrorism.¹⁶⁶ To make harmonisation processes more efficient, there are numerous examples of best practice guides on how to transpose UN counter-terrorism law into domestic law.¹⁶⁷ On a bilateral

162. See Neil Boister, 'Transnational Criminal Law?' (2003) 14 *European Journal of International Law* 953–76. For the special context of harmonisation of criminal law in the EU see Valsamis Mitsilegas, *EU Criminal Law* (Portland, Hart Publishing, 2009) 59–114.

163. Kimmo Nuotio, 'Terrorism as a Catalyst for the Emergence, Harmonization and Reform of Criminal Law' (2006) 4 *Journal of International Criminal Justice* 998–1016, 1012.

164. Council Framework Decision on Combating Terrorism 2002/475 [2002] OJ L164/3 (EU).

165. For example, Eurojust, see Michèle Coinsx, 'Strengthening Interstate Cooperation: The Eurojust Experience' in Ana María Salinas de Frías et al (eds), *Terrorism: International Law and Practice* (Oxford, Oxford University Press, 2012) 965, 989.

166. For example, a US Country Report states that Bosnia and Herzegovina harmonised its criminal code with the EU and UN legal framework on counter-terrorism, see 2012 Country Reports on Terrorism, 63 *United States Department of State Publication, Bureau of Counterterrorism*. Similarly, for Montenegro see the 2008 Country Reports on Terrorism, 85 *United States Department of State Publication, Bureau of Counterterrorism*.

167. Domestic implementation of suppression conventions and quasi-legislative resolutions by the Security Council is often aided by 'model laws'. In the field of counter-terrorism, the UN CTC has the mandate to prepare model laws for the areas covered in Resolution 1373, see SC Res 1373, UN Doc S/RES/1373, para 6; SC Res 1377, UN Doc S/RES/1377 (12 November 2001) (inviting the CTC to explore the 'promotion of best-practice in the areas covered by resolution 1373 (2001), including the preparation of model laws as appropriate'). UNODC has prepared a comprehensive manual intended as a model for domestic counter-terrorism legislation, <www.unodc.org/unodc/en/legal-tools/model-treaties-and-laws.html> (last visited 12 July 2017). Model laws encompass suggestions for norms on terrorism in general but also relate to specific issues, such as the financing of terrorism. These model laws have proved to be a valuable tool for developing domestic counter-terrorism capacities, see CA Ward, 'Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council' (2003) 8 *Journal of Conflict & Security Law* 289–305, 303.

level, there are currently ongoing negotiations between the EU and the US on harmonising existing counter-terrorism laws.¹⁶⁸

Why does it make sense—under the cooperation-paradigm—to harmonise counter-terrorism laws? First, as Peter Andreas and Ethan Nadelmann state, 'the capacity of a state to suppress transnational criminality depends greatly on the extent to which its criminal law norms conform with or vary from those of others'.¹⁶⁹ Harmonisation of counter-terrorism law is, in other words, a way to decrease information deficits about foreign law and to create opportunities and obligations for future cooperation and for further approximation of policies. Therefore, international counter-terrorism conventions contain several clauses dealing with cooperation obligations or opportunities. Take, for example, the 1979 International Convention against the Taking of Hostages, stipulating in art 4 (b) that 'States Parties shall co-operate in the prevention of the offences set forth in article 1, particularly by ... [e]xchanging information and co-ordinating the taking of administrative and other measures as appropriate to prevent the commission of those offences'.¹⁷⁰

Second, another objective of harmonisation is improving the law. Harmonisation is about substituting domestic norms with 'better' international norms.¹⁷¹ For example, counter-terrorism norms usually aim to enhance the security capacities of states facing threats by global terrorism networks. Examples are the duty to establish jurisdiction (over certain terrorist crimes),¹⁷² the duty to criminalise particular terrorist crimes,¹⁷³ or the duty

168. See Kristin Archick, *US-EU Cooperation Against Terrorism*, Federation of American Scientists, <www.fas.org/sgp/crs/row/RS22030.pdf> (last visited 7 July 2017).

169. Peter Andreas and Ethan Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (Oxford, Oxford University Press, 2008) 227.

170. International Convention against the Taking of Hostages art 4(b), 18 December 1979, 1316 UNTS 205.

171. For this argument in a commercial law context see Paul B Stephan, 'The Futility of Unification and Harmonization in International Commercial Law' (1999) 39 *Virginia Journal of International Law* 743–97, 748. According to Trachtman's welfarist approach that I follow here, 'better' rules are those that increase the (domestically determined) public welfare, see Trachtman (n 16) 22–23.

172. For example, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons art 3, 14 December 1973, 1035 UNTS 167; International Convention against the Taking of Hostages art 5, 18 December 1979, 1316 UNTS 205; International Convention for the Suppression of Terrorist Bombings art 6, 12 January 1998, 2149 UNTS 256; International Convention for the Suppression of the Financing of Terrorism art 7, 10 January 2000, 2178 UNTS 197; International Convention for the Suppression of Acts of Nuclear Terrorism art 9 of the 2005, 14 September 2005, 2445 UNTS 89.

173. Examples: Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons art 2(2), 14 December 1973, 1035 UNTS 167; International

to establish the liability of legal persons.¹⁷⁴ In all of these cases, international law-making serves to strengthen domestic counter-terrorism capacities.

Third, harmonisation of counter-terrorism laws is a way to internalise 'security externalities' since collective action problems may be better addressed by cooperative rulemaking than by individual solutions.¹⁷⁵ In the situation of a shared threat, paradigmatically (though not limited to) global terrorism, harmonisation of laws is a way to manage legal risks and thus to ensure more stability in an important field of public policy.¹⁷⁶ For example, international counter-terrorism instruments usually require all contracting states to adopt laws criminalising specific acts of terrorism, eg the acquisition of nuclear material by private persons.¹⁷⁷ Here, international law sets a narrow margin for differences in domestic law-making in order to minimise potentially negative external effects. To take another example, the 1999 International Convention for the Suppression of the Financing of Terrorism requires that contracting states adopt the

necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2.¹⁷⁸

This norm entails harmonisation in relation to the goal that is to be achieved, namely, that legal persons may be held liable for violations of legal norms on counter-financing of terrorism (it is, however, flexible as to the means of achieving that goal).¹⁷⁹ In that way, the potential for adverse external effects caused by differences in domestic legal systems regarding the sanctioning of legal persons are reduced, though full harmonisation is avoided.

Convention against the Taking of Hostages art 2, 18 December 1979, 1316 UNTS 205; International Convention for the Suppression of Terrorist Bombings art 4, 12 January 1998, 2149 UNTS 256; International Convention for the Suppression of the Financing of Terrorism art 4, 10 January 2000, 2178 UNTS 197; International Convention for the Suppression of Acts of Nuclear Terrorism art 5, 14 September 2005, 2445 UNTS 89.

174. Example: International Convention for the Suppression of the Financing of Terrorism art 5, 10 January 2000, 2178 UNTS 197.

175. On this argument in a commercial law context see Stephan (n 171) 749. On 'security externalities' see section 2.2 above.

176. Adapting an argument from Stephan (n 171) 746.

177. International Convention for the Suppression of Acts of Nuclear Terrorism art 5, 14 September 2005, 2445 UNTS 89.

178. International Convention for the Suppression of the Financing of Terrorism art 5(1), 10 January 2000, 2178 UNTS 197.

179. *Ibid.*, art 5(3) (liability may be operationalised through criminal, civil or administrative sanctions).

In practice, however, international harmonisation of counter-terrorism norms is a complex, often impossible task. As the US Counter-Terrorism Reports show, there are great differences among the states regarding compliance with international norms on counter-terrorism.¹⁸⁰ What are the problems of harmonising counter-terrorism laws? A first obstacle to harmonisation is the lack of a shared understanding of the phenomenon to be regulated. It is well-known that terrorism is notoriously difficult to define¹⁸¹ and, in fact, the international community has not agreed upon a universal definition of it.¹⁸² The lack of a universal definition is a fundamental problem hindering the harmonisation of laws.

A second problem is the diversity of criminal law systems and criminal law cultures. For example, even if a universal definition of global terrorism existed, it would still be doubtful whether liberal democracies would share information gained in counter-terrorism operations with non-liberal states.¹⁸³

180. For example, the 2012 US Country Report on Terrorism criticised Turkey for its 'continued lack of progress in adequately criminalizing terrorist financing and establishing a legal framework to freeze terrorist assets' (fn 31) 100, Kuwait and Yemen for lacking a legal framework for prosecuting terrorism-related crimes altogether (fn 31) 126 resp 150. See Katja Samuel, 'The Rule of Law Framework and its Lacunae: Normative, Interpretative, and/or Policy Created?' in Salinas de Frias et al (n 2) 14, 18 (noting the 'poor harmonization of national, regional, and international anti-terrorism law-making and instruments').

181. It has been pointed out that the difficulty of definition is due to the fact that 'various institutions compete for the most appropriate approach', Mathieu Deflem, 'Terrorism' in J Mitchell Miller (ed), *21st Century Criminology: A Reference Handbook* 533 (Thousand Oaks, SAGE Publications, 2009). On the definition of terrorism followed in this article, see n 1.

182. As a (second-best) way out, international law-making relies on sectoral, context-specific definitions of terrorism. See eg International Convention for the Suppression of the Financing of Terrorism art 2, 10 January 2000, 2178 UNTS 197. See also International Convention for the Suppression of Acts of Nuclear Terrorism art 2, 14 September 2005, 2445 UNTS 89. To tackle the freedom-fighter problem it has been deemed necessary to include provisions in international conventions that further delineate the concept, eg clauses stating that terrorist acts 'are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature', see eg, International Convention for the Suppression of Terrorist Bombings art 5, 12 January 1998, 2149 UNTS 256, and International Convention for the Suppression of Acts of Nuclear Terrorism art 6, 14 September 2005, 2445 UNTS 89.

183. The reverse situation is also problematic: should courts in liberal states accept evidence allegedly gained from torture in non-liberal states? For a recent case on the problem see *Othman (Abu Qatada) v United Kingdom*, Application no 8139/09, European Court of Human Rights, Final Judgment (9 May 2012), para 56. See generally Tobias Thienel, 'The Admissibility of Evidence Obtained by Torture under International Law' (2006) 17 *European Journal of International Law* 349–67.

Even within the EU, the diversity of criminal law systems is a severe obstacle to harmonisation. The EU Member States have been reluctant to include counter-terrorism among the truly supranational issues (with the effect of opening up counter-terrorism law for EU harmonisation efforts).¹⁸⁴ Instead, the method used is ‘mutual recognition’, ie the recognition and enforcement of foreign criminal law, as a second-best alternative to harmonisation of counter-terrorism laws.¹⁸⁵

A third problem with harmonisation of counter-terrorism law is that it is, so far, non-holistic, ie it focuses on individual norms rather than employing a systemic approach: Harmonisation affects some norms directly, but leaves other domestic norms (eg those that are only indirectly implicated) untouched. This may lead to unwanted systemic imbalances. The introduction of the corporate liability norm mentioned above by the 1999 Convention for the Suppression of the Financing of Terrorism is an example.¹⁸⁶ Implanting such a norm into a legal system may require changes in the law of criminal procedure and, at least as importantly, should be counter-balanced by domestic human rights (eg the extension of some procedural human rights to legal persons). International harmonisation efforts do not sufficiently pay tribute to these (indirect) consequences.

4.2. Imposition of Legal Norms through UN Security Council Resolutions

A second technique of international law-making is the ‘imposition’ of legal norms. By imposition I mean the unilateral transfer of a norm through a legally binding act with cross-border application. An instrument for the imposition of international norms is a resolution (by an organ of an international organisation, paradigmatically the UN Security Council). ‘Imposition’ presupposes a hierarchical relationship, built on an asymmetrical distribution of power.¹⁸⁷

184. Javier Argomaniz, ‘Post-9/11 Institutionalisation of European Union Counterterrorism: Emergence, Acceleration and Inertia’ (2009) 18 *European Security* 151–72.

185. Oldrich Bures, *EU Counterterrorism Policy: A Paper Tiger?* (Farnham, Ashgate, 2011) 168. On transnational mutual recognition in general see Kalypso Nicolaidis and Gregory Shaffer, ‘Transnational Mutual Recognition Regimes: Governance Without Global Government’ (2005) 68 *Law and Contemporary Problems* 263–318.

186. International Convention for the Suppression of the Financing of Terrorism art 5, 10 January 2000, 2178 UNTS 197.

187. Holzinger and Knill (n 158) 781.

Law-making through imposition is still a great exception given that the international legal order is based on the equality of states.¹⁸⁸ Nevertheless, the Security Council has—with its counter-terrorism agenda—entered into a ‘legislative phase’ and, in particular, resolutions 1373 (2001), 1540 (2004), and the recent Resolution 2178 (2014) are of a quasi-legislative character since they were unilaterally imposed through a binding decision of the Security Council.¹⁸⁹ Obviously, this classification depends on how ‘legislative action’ is understood in the context of acts by a UN organ. One has a fairly clear image of what legislative action means in the domestic context, usually involving an elected or at least democratically accountable body which promulgates binding (abstract-general) rules satisfying certain criteria of rule of law.¹⁹⁰ In the case of legislative action by the UN, there are clear differences to domestic law-making: Security Council quasi-legislative resolutions are addressed to states only, not—as in the case of domestic law-making—to individuals.¹⁹¹ Furthermore, the procedure of adoption is much less formal than that of domestic laws which often require multiple hearings.¹⁹² Usually, the adoption of quasi-legislative resolutions by the UN Security Council is preceded by informal negotiations by the Council members, and then a simple vote is taken.¹⁹³ In addition, there is no such thing as an accepted ‘theory’ of law-making with regard to the UN.¹⁹⁴ The simple reason is that until now such a theory was dispensable since law-making was not conceived of as a possible competence of a UN organ. Note, however, that the Council has never used

188. Art 2(1), Charter of the United Nations, 26 June 1945, in force 24 October 1945, 1 UNTS XVI.

189. See Jose E Alvarez, ‘Hegemonic International Law Revisited’ (2003) 97 *American Journal of International Law* 873–88, 874. Examples from the vivid discussion in the literature on Security Council law-making include: Paul C Szasz, ‘The Security Council Starts Legislating’ (2002) 96 *American Journal of International Law* 901–05; Eric Rosand, ‘The Security Council as “Global Legislator”: Ultra Vires or Ultra Innovative?’ (2004) 28 *Fordham International Law Journal* 542–90; Stefan Talmon, ‘The Security Council as World Legislature’ (2005) 99 *American Journal of International Law* 175–93.

190. Lon Fuller, *The Morality of Law* (Virginia, Yale University Press, 1964) 46.

191. Roberto Lavalle, ‘A Novel, if Awkward, Exercise in International Law-Making: Security Council Resolution 1540’ (2004) 51 *Netherlands International Law Review* 411–37, 415.

192. Talmon (n 189) 186–88 (stating that resolutions are usually prepared in the course of informal consultations of the members and often adopted without a debate).

193. This simple procedure is much criticised. For the context of the recent UN Security Council Resolution 2178, see Martin Scheinin, ‘A Comment on Security Council Res 2178 (Foreign Terrorist Fighters) as a “Form” of Global Governance’ *Just Security Blog* (6 October 2014), <justsecurity.org/15989> (last visited 7 July 2017).

194. The absence of meaningful ‘theories of law-making’ at the domestic level has often been noted: Jeremy Waldron, *The Dignity of Law-making* (Cambridge, Cambridge University Press, 1999) 1.

the label of law-making or, even less so, legislative act for any of its acts. Instead of formally distinguishing these acts, the Council has cast them in the familiar style of decision-making in the form of 'resolutions'.¹⁹⁵ In general, legislating is not something that international organisations regularly do.¹⁹⁶ The term 'law-making' should, therefore, still be used with caution in the context of the Security Council action.

Although a rare phenomenon in practice, Eric Rosand has claimed that there is a 'widely accepted definition of law-making' with regard to the UN.¹⁹⁷ According to this definition, the act must be unilateral, create or modify a legal norm of a general nature, and be directed to an indeterminate group of addressees while capable of repeated application over time.¹⁹⁸ In short, the formal imposition of norms relates to the unilateral transfer of abstract-general norms of a binding character.¹⁹⁹ The element of 'generality' refers to the addressees. As the Colombian delegate to the Security Council, Maggie Farley, stated: a quasi-legislative resolution 'does not name a single country, society or group of people'.²⁰⁰ Rather, it targets all states. 'Abstractness' relates to the subject-matter of quasi-legislative resolutions: They are not concerned with a specific situation or individualised conduct, but rather with a certain type of agency (eg, financing of terrorism or the cross-border movement of terrorist suspects).²⁰¹ Resolutions 1373 (2001), 1540 (2004) and 2178 (2014) meet these criteria. They are 'general' in the sense of obligating 'all States' or 'all Member States'.²⁰² Furthermore, they are 'abstract' in the sense that they do not target a specific situation, but aspects of terrorism as a (potentially) particularly harmful form of human agency. In this regard,

195. Some have held that the Security Council was unaware of the novelty of its action when adopting SC Res 1373 (2001), see Szasz (n 189) 905.

196. Klabbers (n 18) 187 (pointing, among other things, to art 12 of the Chicago Convention which entrusts the International Civil Aviation Authority with the power to establish rules regulating aircraft flying over the High Seas).

197. Rosand (n 189) 545, fn 11.

198. Rosand (n 189) 545, fn 11 (referring, among other things, to the classical treatment by Edward Yemin). See also Brunnée (n 50) 48–51 (normative act promulgated unilaterally by an authorised organ and containing general, abstract and directly binding legal norms).

199. See, eg, Talmon (n 189) 176; Peters (n 106) 'para 67.

200. Maggie Farley, *UN Measure Requires Every Nation to Take Steps against Terrorism* in *L.A. Times* (28 September 2001) (quoted by Talmon (n 189) 177, fn 20).

201. See Matthew Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16 *Leiden Journal of International Law* 593–610, 598.

202. For example, SC Res 1373, UN Doc S/RES/1373, para. 1–6; SC Res 1540 (2004), UN Doc S/RES/1540, 28 April 2004, para 1–5, 8–10; SC Res 2178 (2014), UN Doc S/RES/2178, 24 September 2014, para 2–6.

Resolution 1373 (2001) concerns the financing of terrorism, while Resolution 1540 (2004) seeks to prevent nuclear, chemical or biological weapons falling into illicit hands, especially those of terrorists. Resolution 2178 (2014) deals with the prevention of cross-border movement of terrorists or terrorist groups. In line with their abstract-general nature, these resolutions do not provide for a time limit of application.²⁰³ They remain in force until repealed by the Security Council and apply to an indefinite number of cases.

In the cooperation paradigm used here, when does imposition of counter-terrorism law make sense, and why? A pure efficiency focus is too short-sighted in this case. While it may be more efficient to rely on the 'fast track' procedure of Security Council imposing norms, there are serious concerns from the perspective of legitimacy: It seems to be clear that norm imposition by the Security Council, in the absence of a UN Charter amendment, may not replace the existing procedures of international law-making, ie treaty law or customary international law. To install law-making by resolutions on an equal footing with the other two law-making procedures—treaty law and customary law—would in my view require a formal amendment of the UN Charter (and other treaties). One reason is that the legal architecture of the UN Charter contemplates Chapter VII law as 'crisis law' (in particular, by virtue of Article 39 of the UN Charter). Security Council law-making without a 'crisis' of sorts is illegitimate. But, of course, one can argue that severe cooperation deficiencies among states on a vital global public good constitute a 'crisis'. The imposition of norms by the Security Council must, in other words, remain of a subsidiary character only. This is sometimes addressed as 'urgency requirement'²⁰⁴ or as the existence of a 'need for general law'.²⁰⁵ The urgency requirement is met, in exceptional circumstances only, if the ordinary procedure—despite the existence of an actual 'threat to the peace'—has either failed (eg, because a minority of states withholds their consent preventing an international solution) or is unlikely to produce an efficient result (eg unspecific norms).²⁰⁶

Apart from this pragmatic reason, imposition can be an effective way to handle weakest link situations: If the success of a counter-terrorism measure depends on the performance of the weakest link, the rest of the international community has a particularly strong reason to force that state to adopt the necessary rules.

203. Talmon (n 189) 176.

204. See Rosand (n 189) 579–80 ('new and urgent threat not addressed by existing treaty regimes').

205. See Bianchi (n 108) 892–903, 888.

206. See Bianchi (n 108) 892–903, 888 (stating that customary law-making would—in the case of terrorism—not have produced sufficiently precise norms, requiring, eg, asset freezing or the criminalisation of certain acts).

On a general note, the legitimacy of transnational legislative law-making (by imposition) could gain from an empirical study on its cost-effectiveness.²⁰⁷

4.3. Diffusion of Norms on Counter-Terrorism through Legislative Networks

Diffusion of law refers to consensual, non-binding law-making (or, rather, norm dispersion) with transnational effect through international legislative networks.²⁰⁸ International law-making by diffusion differs from harmonisation in that the creation of conformity with international norms does not follow from a legally binding formal act but from informal interaction. Diffusion is also to be distinguished from imposition in that there is no hierarchical relationship between the 'law-creator' and the 'law-recipient'. International networks engaged in the diffusion of norms are, in principle, conceivable for any of the three branches of government: there may be legislative, administrative, and judicial networks.²⁰⁹

In most areas, administrations and the judiciary seem to be more successful in establishing international networks (eg on human rights, on environmental issues). However, in the field of counter-terrorism, legislative networks have become crucial platforms for the dispersion of legal norms.²¹⁰ At the UN level for example, the CTC provides legislative assistance to domestic law-making bodies.²¹¹ Another legislative network of increasing importance is formed in the context of the Organization for Security and Co-operation in Europe (OSCE).²¹² Various sub-units of the OSCE offer assistance to national legislators in drafting legislation to criminalise terrorist offences and

207. While the cost-effectiveness of individual targeted sanctions has been made the subject of a recent study by the Targeted Sanctions Consortium (TSC) (in *The Effectiveness of United Nations Targeted Sanctions* (November 2013), <graduateinstitute.ch/files/live/sites/iheid/files/sites/internationalgovernance/shared/Effectiveness%20of%20UN%20Targeted%20Sanctions%20-%206.Nov.2013%20.pdf> (last visited 7 July 2017), a comparable study has—to the best of my knowledge—not yet been undertaken with regard to abstract-general law-making by imposition.

208. On 'diffusion of law' see Richard M Buxbaum, 'Law, Diffusion of' in Neil J Smelser and Paul B Baltes (eds), *International Encyclopedia of the Social and Behavioral Sciences*, 2nd edn (Amsterdam, Elsevier, 2004) 9206–13, 9206.

209. See Martin S Flaherty, 'Judicial Foreign Relations Authority After 9/11' (2011/12) 56 *New York Law School Law Review* 119–64, 140–144 (distinguishing between 'executive', 'legislative', and 'judicial globalisation').

210. *Ibid.*, 142.

211. Security Council CTC, <www.un.org/en/sc/ctc/> (last visited 7 July 2017).

212. On the OSCE as a legislative network, see Anne-Marie Slaughter, *A New World Order* (New Jersey, Princeton University Press, 2004) 128. The OSCE is a regional arrangement under Ch VIII of the UN Charter, comprising 57 state parties, see *Organization for Security and Co-operation in Europe*, <www.osce.org/who> (last visited 7 July 2017).

to ensure its conformity with human rights.²¹³ Another network that has become active in the field of counter-terrorism is NATO (North Atlantic Treaty Organisation) which established a network of civil experts on terrorism.²¹⁴ Additionally, there are other regional organisations that form legislative networks on counter-terrorism, eg, the Intergovernmental Authority on Development in Eastern Africa (IGAD)²¹⁵ or the Inter-American Committee on Terrorism (CICTE).²¹⁶ Besides international and regional organisations, there are individual states, such as the US, that have become engaged in cross-border norm diffusion through governmental aid programmes.²¹⁷

What are the reasons for law-making by diffusion under the cooperation paradigm? In a rather broad sketch one may distinguish between the following rationales for diffusion of norms through international legislative networks: cross-border learning and (a flexible, informal type of) problem-solving are likely to count as the major goals of diffusion.²¹⁸

First, where universal or regional norms do not command the adoption of a specific solution or regulatory design (as is regularly the case), international law-making by diffusion allows learning from the experience of others. The rationale of cross-border learning assumes that governments pose themselves the question: 'Under what circumstances and to what extent would a programme now in effect elsewhere also work here?'²¹⁹ Take the example of

213. Ministerial Statement on Supporting the United Nations Global Counter-Terrorism Strategy, Organization for Security and Co-operation in Europe, 30 November 2007, MC.DOC/3/07, para 22. See also the Ministerial Council Ministerial Statement on Supporting and Promoting the International Legal Framework against Terrorism, Organization for Security and Co-operation in Europe, 5 December 2006, MC.DOC/5/06.

214. On NATO's counter-terrorism activities see <www.nato.int/cps/en/natolive/topics_77646.htm> (last visited 7 July 2017). However, NATO's activity is primarily on an operative, non-legislative level, eg conducting a number of counter-terrorism activities, such as Operation Active Endeavour (OAE, a maritime surveillance operation in the Mediterranean).

215. IGAD, in 2006, launched the 'Capacity Building Programme against Terrorism' (ICPAT), see <www.igadregion.org/icpat/> (last visited 12 July 2017). See also R Tavares, *Regional Security: The Capacity of International Organizations* (Oxon, Routledge, 2010) 52.

216. On the role of CICTE in providing legal assistance on counter-terrorism, see JR Perales, 'Crime, Violence, and Security in the Caribbean' (2008) 29 *Woodrow Wilson Center Update on the Americas* 4 <theislamistsarecoming.wilsoncenter.org/sites/default/files/lap.cc.29.pdf> (last visited 7 July 2017).

217. See Leslie E King and Judson M Ray, 'Developing Transnational Law Enforcement Cooperation: The FBI Training Initiative' (2000) 16 *Journal of Contemporary Criminal Justice* 386–408.

218. This is an adaptation to the legal context of the reasons given by Holzinger and Knill (n 158) 782–86.

219. Holzinger and Knill (n 158) 783 (quoting R Rose).

material support to terrorism. International law requires the criminalisation of material support to terrorism, but leaves open which conception of material support states adopt.²²⁰ Consequently, there are very broad approaches to material support, like in the US, where even peaceful aid (such as provision of training on how to use international law for resolving disputes peacefully) may be criminalised.²²¹ On the other side of the spectrum, there are narrower approaches to material support, for example in the case of Canada. Canadian law requires that the contribution must be 'made for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity'.²²² The Canadian approach to material support is more appropriate, if the social goal of a society is to cut off terrorist organisations from the means to carry out their attacks while at the same time allowing for 'socially acceptable' forms of interaction with, say, charity organisations. On the other hand, the US approach is more appropriate, if any contribution to a terrorist organisation is considered a potential 'dual use' (ie furthering both legitimate and criminal aims).

Second, transnational legislative networks allow for flexible and informal transnational problem-solving. According to Holzinger and Knill transnational problem-solving is:

driven by the joint development of common problem perceptions and solutions to similar domestic problems and their subsequent adoption at the domestic level. Transnational problem-solving typically occurs within transnational elite networks or epistemic communities, defined as networks of policy experts who share common principled beliefs over ends, causal beliefs over means and common standards of accruing and testing new knowledge.²²³

What are the problems with norm diffusion through transnational legislative networks? Transnational learning assumes that governments act rationally, ie that they are willing to change existing policies for 'superior' ones.²²⁴ Given that diffusion is an informal way of transnational law-making, its success largely depends on the political will of the relevant actors of the international community. The ability to engage in transnational learning furthermore presupposes the existence of a certain level of existing homogeneity between

the legal systems of the law-creator and the law-recipient.²²⁵ Finally, transnational learning is only possible if governments are actually able to collect all the necessary information on foreign regulatory designs.²²⁶ Not all of these conditions are likely to be fulfilled in every case. Subsequently, counting on transnational learning may be a rather optimistic rationale.

Transnational problem-solving as the other rationale underlying diffusion of norms through transnational legislative networks has its drawbacks, too. As Louis de Koker writes in a critique on the FATF (that could be generalised for the situation of other transnational legislative networks):

[t]he FATF remains an exclusive club representing a number of influential nations. Its decision-taking processes are largely non-transparent, even to the participants and citizens of its member nations. It acts as an expert group but its expertise is generally not backed by verifiable data and its experts are generally anonymous.²²⁷

In other words, while the problem with transnational learning is its unreliability, the problem of transnational problem-solving is the lack of formalised law-making processes and the exclusivity of membership in transnational networks.

5. Conclusion

Global terrorism remains a major threat to international peace and stability in the future. In cases of truly transnational threats such as global terrorism, states have a great incentive to deepen and increase cooperation through law-making, primarily in order to minimise 'security externalities' and to prevent 'weakest link scenarios'.

The integration of counter-terrorism into the international legal agenda has changed international law as well as the techniques of its creation. The process is still ongoing. Just as the establishment of individual rights at the international level in the course of the human rights movement after the Second World War, the new internationally created legal obligations for individuals impact the very foundations of the international legal order.

220. See GA Res 60/288, UN Doc A/RES/60/288, 20 September 2006, Annex II para 2; SC Res 1373 (2001), UN Doc S/RES/1373, para 2.

221. *Holder v Humanitarian Law Project*, 561 US 1 (2010).

222. Canada Criminal Code, RSC 1985, C-46, s 83.18(1).

223. Holzinger and Knill (n 158) 783 (referring to PM Haas).

224. Holzinger and Knill (n 158) 783 (referring to PM Haas).

225. See *ibid*, 791.

226. See *ibid*, 783.

227. Louis de Koker, 'Applying Anti-Money Laundering Laws to Fight Corruption' in Adam Graycar and Russell G Smith (eds), *Handbook of Global Research and Practice in Corruption* (Cheltenham; Northampton, Edward Elgar, 2011) 340–58, 356.

A reconstruction of this evolution transcends the confines of a traditional doctrinal analysis of international norms. Taking the individual—as an actor on the international plane—seriously, means to question some of the doctrinal dichotomies, like ‘law’ versus ‘non-law’, ‘mediated law’ versus ‘unmediated law’. Transnational law offers a—both conceptual and methodological—framework within which a reconstruction of these legal developments is possible. Global counter-terrorism norms differ from ordinary international legal norms in terms of their quality. Some are of a regulatory nature, some have statute-like density, and there is the potential for self-execution. With the global counter-terrorism norms gaining authoritativeness, we witness the emergence of transnational counter-terrorism legislation.

In the last decade universal counter-terrorism law-making emerged as a truly experimental field of international law-making. The emerging transnational counter-terrorism legislation challenges public international law (as it used to be) in two significant ways. A first new problem is that of ‘integration’. Given the (particular) nature of the reasons for cooperation in this field (in particular, anticipated disastrous external effects of deficient domestic law-making on terrorism as well as weakest link problems), international law-making has to get closer to the normative situation of individuals ‘on the ground’. The problem of integration relates to the gap between ‘the international’ and ‘the domestic’ in counter-terrorism and innovative ways on how to bridge that gap (eg through unorthodox ways of law-making by transnational regulatory resolutions, the establishment of transnational legal networks to shape and disseminate norms and legal standards). A second problem is that of integrity.²²⁸ It has been argued here that there are reasons why the integrity of these provisions must be safeguarded already on the transnational level of norm creation, not just on the level of domestic implementation. ‘Integrity’ requires global counter-terrorism law-making to be informed and constrained by concerns of transnational constitutionalism, either through a clear statement on the supremacy of human rights over regulatory norms, or—preferably—through spelling out in the legal instruments the

228. For a different ‘principle of integrity’, see Ronald Dworkin, *Law’s Empire* (Cambridge, The Belknap Press of Harvard University Press, 1986) 176. Dworkin’s principle of integrity (as applied to the law-maker) establishes the requirement to make the ‘total set of laws morally coherent’, *ibid.* This theory-specific use is not what is meant here. Rather, the principle of integrity refers to the practice of establishing as well as the need for conformity of transnational law-making with higher (normative) standards.

consequences of human rights for regulatory issues, eg the limits set by the right to freedom of association for rules on material support to terrorism.²²⁹ The actors involved in transnational law-making are only just starting to recognise what integrity requires in practical terms. Some developments can be explained by a principle of integrity, eg the reference to human rights and other standards in suppression conventions and recent quasi-legislative resolutions by the Security Council. It cannot be sufficiently stressed that the consequences of (a principle of) integrity in transnational law-making are just beginning to be drawn. The ‘rights-centred approach to counter-terrorism’, announced by the UN Secretary General in November 2014, is a significant step towards taking the principle of integrity seriously on the level of UN law-making.²³⁰

229. For conceptions of transnational constitutionalism, see Wen-Chen Chang and Jiunn-rong Yeh, ‘The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions’ (2008) 27 *Penn State International Law Review* 89–124; Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (Cambridge, Cambridge University Press, 2010).

230. See n 137.